PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

TEJBIR S. OBEROI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Speedy Trial Act requires that the trial of a criminal defendant in federal court begin within 70 days of the filing of the information or indictment or the defendant's first appearance, whichever occurs last. *See* 18 U.S.C. § 3161(c)(1). The Act automatically excludes from this 70-day period any "delay resulting from other proceedings concerning the defendant, including but not limited to . . . (D) delay resulting from any pretrial motion, from *the filing of the motion* through the conclusion of the hearing on or other prompt *disposition of, such motion*." *See id.* § 3161(h)(1) (emphasis added).

This petition presents two questions regarding the interpretation of § 3161(h)(1):

1. Whether the Court of Appeals for the Second Circuit erred in holding—in acknowledged conflict with the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Sixth Circuit—that the time for preparing a pretrial motion is automatically excluded under § 3161(h)(1)(D)?

2. Whether the Court of Appeals for the Second Circuit erred in holding—in acknowledged conflict with the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Eleventh Circuit—that the time for filing objections to a report and recommendation of a magistrate judge is automatically excluded under § 3161(h)(1)(D)?

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INTRODUCTION

This petition presents two straightforward questions of statutory interpretation that have divided the federal courts of appeals. The Speedy Trial Act requires that a criminal defendant's trial commence within 70 days after the filing of an information or indictment or the defendant's initial court appearance. 18 U.S.C. § 3161(c)(1). The remedy for violation of the Act is dismissal of the indictment. *Id.* § 3162(a)(2). But, "recogniz[ing] that criminal cases vary widely and that there are valid reasons for greater delay in particular cases[,] . . . . the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." *Zedner v. United States*, 547 U.S. 489, 497 (2006). In this case, the United States Court of Appeals for the Second Circuit interpreted these exclusions in acknowledged conflict with the decisions of other federal courts of appeals in two separate and independent respects.

First, the Second Circuit held that the Speedy Trial Act automatically excludes from the 70-day speedy trial clock all time designated by the district court for the preparation of pretrial motions.[1] In this

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[1] On December 4, 2008, another petitioner raised this issue in a petition for certiorari to the Eighth Circuit. *See* Pet. for Cert., *Bloate v. United States*, No. 08-728 (filed Dec. 4, 2008). In opposition, the United States questioned whether *Bloate* was an appropriate vehicle for resolving the issue. *See* Br. in Opp. at 11-12, *Bloate v. United States*, No. 08-728 (filed Feb. 4, 2009). The Court issued an Order on February 23, 2009 requesting the record in that case. As detailed below, the vehicle problems identified by the United States are not present here. There is

case, magistrate judges tolled the speedy trial clock for preparation of pretrial motions on four separate occasions, for a total of 153 days. In doing so, the magistrate judges cited 18 U.S.C. § 3161(h)(1)(D), which excludes "delay[s] resulting from any pretrial motion, *from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.*" 18 U.S.C. § 3161(h)(1)(D) (emphasis added). But by its plain terms, § 3161(h)(1)(D) excludes time following the *filing* of a motion, not the time before that point.

The Second Circuit nevertheless upheld the exclusion of time for preparing pretrial motions. The court joined several other circuits in holding that such time may be "excluded under the general language of § 3161(h)(1)," App. 63a-64a, which provides for the automatic exclusion of time for "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" a list of specific types of delays identified in subsections (A)-(H). As the Second Circuit recognized, however, "[t]he circuits that have considered [this] question disagree." App. 23a. Specifically, the Fourth Circuit and the Sixth Circuit hold that the plain text of § 3161(h)(1) and the legislative history of the Speedy Trial Act refute the Second Circuit's interpretation.

Second, the Second Circuit held that the time set aside for filing objections to a magistrate judge's report and recommendation should also be

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no dispute that the Second Circuit's interpretation of § 3161(h)(1) is outcome-determinative in this case.

automatically excluded from the speedy trial clock under § 3161(h)(1). The court reasoned that a magistrate judge's filing of a report and recommendation should be considered a "re-filing" of a pretrial motion, so that the speedy trial clock is automatically tolled, pursuant to § 3161(h)(1)(D), during the following 10-day period in which parties may make objections to the report. But this question has also divided the federal courts of appeals. Four circuits, now including the Second Circuit, hold that the period for objecting to a magistrate judge's report is automatically excluded from the speedy trial clock. Two circuits expressly reject that view and hold that the speedy trial clock resumes after a magistrate judge issues a report.

Both of the Second Circuit's interpretations of the Speedy Trial Act were outcome-determinative in this case. On either issue, had the Second Circuit adopted the reasoning of other circuit courts, the unexcluded periods of delay would have exceeded the 70 days allowed under the Speedy Trial Act between the petitioner's first appearance and the eventual commencement of his trial. Moreover, on both issues, the Second Circuit's decision deepened a split among the circuits on issues concerning the administration of criminal justice in the federal courts—matters that are particularly within this Court's responsibility to resolve. For these reasons, and as detailed below, the petitioner respectfully submits that the Court should grant the writ of certiorari to resolve the conflicts among the courts of appeals on these issues.

OPINIONS BELOW

The Second Circuit's decision is reported at 547 F.3d 436 and reprinted in the Appendix ("App.") at 1a-50a. The district court's decision denying petitioner's motion to dismiss the indictment for violations of the Speedy Trial Act is reported at 295 F. Supp. 2d 286 and reprinted below at App. 51a-102a.

JURISDICTION

The Second Circuit rendered its decision on October 23, 2008, App. 1a, and denied rehearing *en banc* on January 14, 2009, App. 103a-104a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 3161(c)(1) of Title 18 of the United States Code provides in pertinent part:

> [T]he trial of a defendant charged in an information or indictment . . . shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Section 3161(h)(1) of Title 18 of the United States Code provides in pertinent part:

> The following periods of delay shall be excluded . . . in computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion; . . . and (H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.[2]

STATEMENT OF THE CASE

A. District Court Proceedings

On October 14, 1999, federal prosecutors filed a criminal complaint in the United States District Court for the Western District of New York against Dr. Tejbir S. Oberoi, a dentist in Buffalo, New York. App. 3a. The government accused Dr. Oberoi of defrauding insurance companies and employer dental plans by making false reimbursement claims for procedures he never performed. App. 3a. On December 16, 1999, a federal grand jury returned an

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[2] Congress enacted a series of technical amendments to § 3161(h) on October 13, 2008. *See* Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291. The amendments re-designated certain sub-paragraphs of § 3161(h) but made no substantive changes that are relevant in this case. This petition refers to the current sub-paragraph designations instead of those that were in effect at the date of the Second Circuit's decision. Any quotations that pre-date the re-designation have been altered with bracketed text to refer to the current version of § 3161(h).

indictment charging Dr. Oberoi with 34 counts of mail fraud, in violation of 18 U.S.C. § 1341, and 123 counts of making false statements relating to health care benefits, in violation of 18 U.S.C. § 1035(a)(2). App. 3a-4a. After an arraignment on December 22, 1999, Dr. Oberoi pleaded not guilty. App. 59a.

A lengthy pretrial period ensued. As a result of various pretrial motions by the government and Dr. Oberoi, changes in Dr. Oberoi's court-appointed counsel, and two interlocutory appeals to the Second Circuit, there were numerous periods of post-indictment delay in the pretrial proceedings. These delays led to a total of 1,481 days between Dr. Oberoi's arraignment on December 22, 1999 and the commencement of jury selection on January 12, 2004. App. 7a-8a.

For nearly all such periods of delay, the district court, and magistrate judges acting on behalf of the district court, held that the delays were excluded from the Speedy Trial Act's 70-day trial clock, pursuant to exclusions established under the Act. Two categories of delay that the magistrate judges so excluded are at issue here:

First, the magistrate judges assigned to Dr. Oberoi's case excluded four separate periods of time that were designated for the preparation of pretrial motions. In each instance, the magistrate judges excluded this time under 18 U.S.C. § 3161(h)(1)(D), which provides for the exclusion of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."

The first such exclusion occurred on December 28, 1999, when a magistrate judge entered an order

directing the parties to file pretrial motions by February 23, 2000. App. 38a. The order stated that the period of delay for the preparation of such motions—in addition to the time following the filing of motions but preceding oral argument—would be "excluded under 18 U.S.C. § 3161(h)(1)[(D)]." App. 38a-39a. The magistrate judges entered similar orders establishing deadlines for the filing of pretrial orders on March 20, 2000, May 12, 2000, and July 18, 2000. App. 40a-42a. Each order purported to exclude the time for preparing such motions from the 70-day trial clock under § 3161(h)(1)(D). App. 39a. All told, the court excluded 153 days for the preparation of pretrial motions in this manner.

Second, a magistrate judge excluded two periods of time set aside for preparing objections to a report and recommendation issued by the magistrate judge. On December 20, 2000, the magistrate judge issued a report and recommendation on several pretrial motions. App. 43a. Dr. Oberoi's counsel received the report and recommendation on December 27, 2000, App. 43a, which automatically triggered a 10-day period for filing objections with the district court. *See* 28 U.S.C. § 636(b)(1); *see also* W.D.N.Y. Rule 72.3(a)(2). Taking account of weekends and holidays that are not counted in that 10-day clock, the period for making objections expired on January 11, 2001. On that day, defense counsel requested an extension to make objections. App. 43a. On January 12, 2001, the district court entered an order extending the objection period until February 8, 2001. App. 43a. In this way, 44 days total were set aside and used exclusively as time for making objections to the magistrate judge's report.

On June 20, 2003, three-and-a-half years after his initial appearance but while still awaiting trial, Dr. Oberoi moved *pro se* to dismiss the indictment under the Speedy Trial Act. App. 46a. After several rounds of briefing, the district court heard argument on November 12, 2003. In a written decision and order issued on December 11, 2003, the court denied Dr. Oberoi's motion to dismiss. App. 51a.

In denying the motion to dismiss, the court rejected Dr. Oberoi's argument that time set aside for the preparation of pretrial motions could not be automatically excluded under the Speedy Trial Act. The court acknowledged that the plain language of § 3161(h)(1)(D) would not authorize the exclusion of such time, but it held that the time for preparing pretrial motions is nonetheless "automatically excluded under the general language of § 3161(h)(1)." App. 63a, 70a. The district court also rejected Dr. Oberoi's argument that the time for filing objections to the magistrate judge's report could not be automatically excluded. App. 86a-87a. The court relied on cases from the Sixth and Eighth Circuits that reasoned that the magistrate judge's report essentially acts to "re-file" the motions at issue for purposes of the exclusion in § 3161(h)(1)(D). App. 86a-87a.

Having adopted this interpretation of § 3161(h)(1), the district court found that only 20 non-excluded days had elapsed on the 70-day speedy trial clock. App. 102a. After the court issued its decision, and shortly after jury selection finally began, Dr. Oberoi reached a plea agreement with the government under which he agreed to plea guilty to one count of mail fraud and one count of making a

false statement in connection with a healthcare matter in exchange for dismissal of the other 155 counts in the indictment. App. 7a. As part of the plea agreement, Dr. Oberoi expressly reserved his right to appeal under the Speedy Trial Act. App. 7a.

On January 15, 2004, Dr. Oberoi entered a guilty plea pursuant to his agreement with the government. App. 7a-8a. On August 17, 2004, following the resolution of a number of pre-sentencing motions, the district court sentenced Dr. Oberoi to 63 months imprisonment and three years supervised release. App. 8a.

B. Decision of the Second Circuit

Dr. Oberoi, again acting *pro se*, appealed to the Second Circuit. He argued that the indictment should have been dismissed because the post-indictment, pretrial delay in his proceedings violated the Speedy Trial Act. The Second Circuit rejected his arguments and affirmed his conviction. App. 1a.

The Second Circuit recognized that no published opinion from that circuit had decided the question whether motion preparation time could be excluded under any part of § 3161(h)(1) and that "[t]he circuits that have considered that question disagree." App. 23a. The court noted that the Fourth Circuit and the Sixth Circuit do not allow for the automatic exclusion of time set aside for preparation of pretrial motions, *see* App. 24a (citing *United States v. Jarrell*, 147 F.3d 315, 317-18 (4th Cir. 1998); *United States v. Moran*, 998 F.2d 1368, 1370-71 (6th Cir. 1993)), while several other circuits hold that the delay attributable to motion preparation can be excluded under § 3161(h)(1), *see* App. 23a-24a (citing *United States v. Mejia*, 82 F.3d 1032, 1035-36 (11th Cir.

1996); *United States v. Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 913 (10th Cir. 1989); *United States v. Wilson*, 835 F.2d 1440, 1444 (D.C. Cir. 1987); *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985); *United States v. Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982)). Ultimately, the Second Circuit agreed with the latter, holding that the time for preparing motions properly could be excluded under the general language of § 3161(h)(1). App. 27a-28a.

Similarly, the Second Circuit acknowledged disagreement among the circuit courts with regard to the question whether time provided for objections to a magistrate judge's report and recommendation is excludable. The court noted that the Eighth Circuit, the Sixth Circuit, and the Tenth Circuit hold that the time for objecting to the magistrate judge's recommendation is automatically excluded on the theory that the magistrate judge's report serves to "re-file" any pending motion for purposes of § 3161(h)(1)(D). App. 31a-32a (citing *United States v. Long*, 900 F.2d 1270, 1275 (8th Cir. 1990); *United States v. Andress*, 943 F.2d 622, 626 (6th Cir. 1991); *United States v. Mora*, 135 F.3d 1351, 1356-57 (10th Cir. 1998)). The court recognized, however, that the Seventh and Eleventh Circuits take a different approach, according to which "the ten-day period for filing objections is not excluded automatically." App. 32a-33a (citing *United States v. Thomas*, 788 F.2d 1250, 1257 (7th Cir. 1986); *United States v. Robinson*, 767 F.2d 765, 769 (11th Cir. 1985)). The panel ultimately agreed with the district court that such time should be excluded, reasoning that the filing of a magistrate judge's report acts as a re-filing

of the motion at issue and thus also a re-tolling of the 70-day trial clock under § 3161(h)(1)(D). App. 34a.

After examining all of the challenged pretrial time periods, the Second Circuit determined that only 45-57 days had elapsed on Dr. Oberoi's Speedy Trial Act clock—more than the 20 days the district court found, but still short of the 70-day limit. App. 46a. The panel affirmed Dr. Oberoi's conviction.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision That The Time For Preparing Pretrial Motions Should Be Automatically Excluded Under § 3161(h)(1) Conflicts With The Decisions Of The Fourth And Sixth Circuits.

In holding that the preparation time for pretrial motions should be automatically excluded from the 70-day speedy trial clock, the Second Circuit explicitly disagreed with the decisions of the Fourth Circuit and the Sixth Circuit on that very issue. The Second Circuit's interpretation of § 3161(h)(1) finds no support in the plain text of the Speedy Trial Act, however, and is also inconsistent with the legislative history of the Act. For these reasons, and as set forth below, the Court should grant the writ of certiorari to resolve the conflict among the circuit courts and to establish a uniform interpretation of § 3161(h)(1) that comports with the plain text and legislative history of the Speedy Trial Act.

A. The Second Circuit Acknowledged The Well-Developed Split Among The Circuit Courts On This Issue.

In resolving Dr. Oberoi's appeal, the Second Circuit acknowledged a circuit split on the question of whether § 3161(h)(1) automatically excludes time set aside for preparing pretrial motions. App. 23a. While the appeal raised a question of first impression in the Second Circuit, App. 23a, at least 11 federal courts of appeals had addressed the question since the Speedy Trial Act was enacted in 1974.

Several circuits hold that the time for preparing pretrial motions is automatically excluded from the Speedy Trial Act clock under § 3161(h)(1). *See United States v. Bloate*, 534 F.3d 893, 897-98 (8th Cir. 2008); *Mejia*, 82 F.3d at 1035-36; *United States v. Hoslett*, 998 F.2d 648, 654 (9th Cir. 1993); *Mobile Materials, Inc.*, 871 F.2d at 913; *Wilson*, 835 F.2d at 1444; *Tibboel*, 753 F.2d at 610; *Jodoin*, 672 F.2d at 238. These circuits hold that the preparation time should be excluded regardless of whether the exclusion comports with the plain text of § 3161(h)(1). *See Jodoin*, 672 F.2d at 238 ("Whether or not this additional delay fits within the language of § 3161(h)(1)[(D)], . . . it should be excluded.").

On the other hand, the Fourth and Sixth Circuits hold that time for preparing pretrial motions may not be automatically excluded under § 3161(h)(1). These circuits recognize that "[t]ime allotted for the preparation of a pretrial motion is conspicuously absent" from § 3161(h)(1). *United States v. Jarrell*, 147 F.3d 315, 317 (4th Cir. 1998) (internal quotation marks omitted); *see also Moran*, 998 F.2d at 1370-71

("The statute does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations."). These circuits hold that Congress' decision "not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)([D]) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all." *Jarrell*, 147 F.3d at 317.

The Second Circuit rejected the Fourth and Sixth Circuits' approach, which it characterized as the "more restrictive" way of reading the statute. App. 26a. Under the Fourth and Sixth Circuit's interpretation of § 3161(h)(1), the delay resulting from pretrial motions preparation would have added 153 days to Dr. Oberoi's speedy-trial clock—well in excess of the 70 days allowed under the Act.[3]

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[3] The time excluded for motion preparation encompassed: December 29, 1999 until (but not including) February 11, 2000, when the government filed a motion to revoke bail (44 days), App. 38a; March 21, 2000 until (and including) May 10, 2000, as designated in the magistrate judge's order (51 days), App. 40a; May 13, 2000 until (but not including) June 28, 2000, when defense counsel sought an extension of preparation time (46 days), App. 41a; and July 19, 2000 until (but not including) July 31, 2000, when Dr. Oberoi filed pretrial motions (12 days), App. 41a-42a.

B. The Second Circuit's Decision Is Contrary To The Plain Text And Legislative History Of The Act.

In rejecting the Fourth and Sixth Circuits' reading of § 3161(h)(1), the Second Circuit adopted an interpretation that finds no support in the text of the statute. The Speedy Trial Act establishes a non-exhaustive list of events that are automatically excluded from the 70-day speedy trial clock. *See* 18 U.S.C. § 3161(h)(1). The delay resulting from any pretrial motion is one such event, *see id.* § 3161(h)(1)(D), but the Act makes clear that any exclusion of time associated with a motion must be measured "from *the filing of the motion* through the conclusion of the hearing on or other prompt *disposition of, such motion*," *id.* (emphasis added).

Neither § 3161(h)(1)(D), nor any other part of the Speedy Trial Act, creates an automatic exclusion of time for the preparation of pretrial motions before they are filed. Rather, as the Fourth Circuit has observed, "[t]ime allotted for the preparation of a pretrial motion 'is conspicuously absent' from this provision." *Jarrell*, 147 F.3d at 317 (quoting *Hoslett*, 998 F.2d at 655). Accordingly, "Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)([D]) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all." *Jarrell*, 147 F.3d at 317 (citing *United States v. Rojas-Contreras*, 474 U.S. 231, 239-40 (1985) (Blackmun, J., concurring in the judgment). Indeed, the Second Circuit itself appears to have once held this view. *See United States v. Bufalino*, 683 F.2d 639, 646 n.10 (2d Cir. 1982) (opining that "the entire

time from January 9, when defendants were arraigned, to March 9, when motions were filed, is counted toward the 70-day statutory period").

Now, however, the Second Circuit, and the other circuits that hold preparation time for pretrial motions to be automatically excluded, base their decisions upon the non-exhaustive nature of the Speedy Trial Act. These courts have reasoned "that the phrase 'including but not limited to' in § 3161(h)(1) indicates that the particular time periods listed in subsections A through J are an illustrative rather than an exhaustive enumeration of those delays resulting from 'other proceedings concerning the defendant.'" *United States v. Lewis*, 980 F.2d 555, 564 (9th Cir. 1992) (*citing Wilson*, 835 F.2d at 1444-45; *Tibboel*, 753 F.2d at 610; *Jodoin*, 672 F.2d at 237-38); *see also Mobile Materials, Inc.*, 871 F.2d at 913; *Bloate*, 534 F.3d at 897-98. According to these courts, "[t]he open-ended construction of . . . section 3161(h)(1)," *Mobile Materials, Inc.*, 871 F.2d at 913, and the fact that this list "is merely illustrative, and not intended to be exhaustive," *Wilson*, 835 F.2d at 1444, indicate that motion preparation time is properly excluded.

The problem with this interpretation is that it simply ignores the plain text of the statute. Regardless of whether § 3161(h)(1) is non-exhaustive in excluding different types of events from the 70-day speedy trial clock, it is § 3161(h)(1)(D) that specifically addresses any delays resulting from the filing of pretrial motions. In this context, the statute is clear: only the time "from the filing of the motion" through the "prompt disposition" of the motion is excluded. *See* 18 U.S.C. § 3161(h)(1)(D). That other

types of delay beyond those enumerated in § 3161(h)(1) may be excluded under the Act provides no good basis for ignoring the statute's unambiguous and specific restrictions on the exclusion of time for delay due to preparation of pretrial motions.

The Second Circuit's conflict with the plain text of the Speedy Trial Act is even more apparent in light of the Act's legislative history. In 1979, Congress considered and rejected amendments proposed by the Department of Justice that would have included pretrial motion preparation time within the scope of § 3161(h)(1)(D). *See* H.R. 3630, 96th Cong. (1979). In response, the Senate Committee on the Judiciary stated that, although "some witnesses contended that all time consumed by motions practice, from preparation through their disposition, should be excluded, *the Committee finds that approach unreasonable.*" S. REP. NO. 96-212, at 33-34 (1979) (emphasis added). Instead, the Committee contemplated that delays for pretrial motions would be excluded only in certain cases under § 3161(h)(7)(B), which permits "reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts." *Id.* at 34. The House approved this amendment—not a blanket automatic exclusion for preparation time of the sort the Second Circuit approved in this case—and the amendment became law on August 2, 1979. *See* Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, § 4, 93 Stat. 328.

In sum, the plain text of the Speedy Trial Act and the Act's legislative history make clear that delays arising from the preparation of pretrial motions are not automatically excludable under § 3161(h)(1).

The Second Circuit's erroneous interpretation to the contrary allowed the automatic exclusion in Dr. Oberoi's case of 153 days of delay relating to the preparation of pretrial motions—more than double the Act's 70-day limit. Because more than 70 days, properly calculated, elapsed between Dr. Oberoi's arraignment and the commencement of trial, the district court should have dismissed the charges against Dr. Oberoi.

II. The Second Circuit's Decision That The Time For Objecting To The Report And Recommendation Of A Magistrate Judge Should Be Automatically Excluded Under § 3161(h)(1) Conflicts With The Decisions Of The Seventh And Eleventh Circuits.

The Second Circuit in this case followed the Sixth, Eighth, and Tenth Circuits, but disagreed with the Seventh and Eleventh Circuits, in holding that the time for objecting to a magistrate judge's report and recommendation is automatically excluded from the 70-day speedy trial clock under § 3161(h)(1)(D). This decision is contrary to the text and purpose of the Speedy Trial Act, and it is, moreover, based upon internally inconsistent reasoning and a fundamental misconception about the role of magistrate judges. Judges, magistrate judges, the Speedy Trial Act, and the interplay among them are at the heart of the federal criminal justice system. This Court's review is necessary to correct the Second Circuit's error and to resolve the split among the circuits on a matter concerning the orderly administration of the federal courts.

A. The Second Circuit Acknowledged The Well-Developed Split Among The Circuit Courts On This Issue.

The Second Circuit acknowledged that "[t]he filing of a report and recommendation by a magistrate judge raises . . . close questions under the Speedy Trial Act." App. 29a. With respect to whether the 10-day period allowed for objections to the magistrate judge's report is automatically excluded, the Second Circuit noted that the Sixth, Eighth, and Tenth Circuits come out one way, while "[t]he Seventh and Eleventh Circuits take a slightly different tack." App. at 32a.

With the *Oberoi* decision, the Second, Sixth, Eighth, and Tenth Circuits hold that the 10-day period for objections is automatically excluded. *See* App. 34a; *Long*, 900 F.2d at 1275 ("The filing of the report and recommendation . . . in essence serves to re-file the motions, together with the magistrate's study of them, with the district court."); *Mora*, 135 F.3d at 1357-58 (following *Long* in holding that the speedy trial clock is tolled once the magistrate judge issues his report to protect "the trial judge's duty to review the report and recommendation"); *Andress*, 943 F.2d at 626 ("The district court is 'unable to rule' on the report and recommendation until it has the parties' objections in hand.").

The Seventh and Eleventh Circuits, on the other hand, hold that there is no motion before the court unless and until the parties file objections to the report, and that the speedy trial clock, therefore, only stops once such objections are filed. *See Thomas*, 788 F.2d at 1257 (noting that after the report was issued, "[t]he motions were no longer

under active consideration, not unless the defendant objected to the recommendations"); *Robinson*, 767 F.2d at 769 (finding that issuance of the magistrate judge's report is "prompt disposition" of the motion).

This split is not merely academic. In many cases, including this one, exclusion of the objection period will be outcome-determinative under the Speedy Trial Act. In addition, in many cases, more than one pretrial motion will be considered by a magistrate judge. Ten days for each motion can amount to serious delay. This is particularly so when one considers that the relevant period is ten days from when the parties receive copies of the magistrate judge's report, and that under the Federal Rules, those ten days exclude weekends and holidays. FED. R. CIV. P. 6(a)(2).

In this case, for instance, the automatic exclusion of the time for filing objections was outcome-determinative. The magistrate judge issued his report on December 20, 2000, but Dr. Oberoi did not receive a copy until December 27, 2000. App. 43a. With the intervening weekends and New Year's Day holiday, his objections were not due until January 11, 2001. App. 43a. On January 11, 2001, Dr. Oberoi asked for an extension until February 8, 2001, which Dr. Oberoi received on January 12, 2001. App. 43a.

The magistrate judge's consideration of a single motion in this case thus added 44 excludable days to Dr. Oberoi's trial clock under the Second Circuit's

erroneous interpretation of § 3161(h)(1)(D).[4] Were those 44 days (or even the 21 days that did not include the extension) included, as they would have been under the decisions of the Seventh or Eleventh Circuits, the delays in Dr. Oberoi's proceedings would have exceeded 70 days, and the charges against him would have been dismissed.

B. The Second Circuit's Decision Is Contrary To The Plain Text And Purposes Of The Speedy Trial Act.

The Second Circuit erroneously held that the issuance of the magistrate judge's report and recommendation "re-files" the motion at issue with the district court because the district court is "required to make a de novo determination on the issues to which a party objects' . . . . [and e]ven if neither party files an objection to the report and recommendation, the motion itself is decided only after the district court rules." App. 33a. But this reasoning ignores the text of the Speedy Trial Act, is internally inconsistent, and conflicts with the purposes of the Speedy Trial Act and Federal Magistrates Act, 28 U.S.C. § 631 (2006).

The Second Circuit's characterization of the issuance of the magistrate judge's report as a "re-

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[4] These 44 days encompass December 21, 2000 until (but not including) January 11, 2001, the day on which defense counsel sought an extension of the 10-day objection clock (21 days), App. 43a, and January 13, 2001, when the district court granted the requested extension, until (but not including) February 5, 2001, when the government filed a motion to revoke bail (23 days), App. 43a-44a.

filing" of the motion is nothing more than a legal fiction designed to shoehorn this event into one of the automatic exclusions provided under § 3161(h)(1). This is creative, but completely at odds with the text of the statute. *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007) (rejecting reading of statute that conflicted with clear text). Section 3161(h)(1)(D) excludes from the speedy trial clock all "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D). The filing of the magistrate judge's report and recommendation is not the filing (or re-filing) of a motion. Motions, after all, are filed by parties, not judges. *See* FED. R. CIV. P. 7; 28 U.S.C. § 636(b)(1)(C) (stating that "the magistrate judge shall file his proposed finding and recommendations" with the court without mentioning filing the motion).

Instead, the issuance of the magistrate judge's report is a disposition of the motion within the meaning of § 3161(h)(1)(D). Every circuit court to confront the question of whether the magistrate judge's issuance of a report is a disposition within the meaning of § 3161(h)(1)(D) has reached this very conclusion, including the court below. The magistrate judge's issuance of a report and recommendation on a motion is a "prompt disposition of [the] motion," and therefore ends the period of automatic exclusion for consideration of the motion under subsections (h)(1)(D) and (h)(1)(H). App. 34a ("[W]e adopt the *Long* approach."); *Mora*, 135 F.3d at 1356; *Long*, 900 F.2d at 1274-75 ("Section 3161(h)(1)[(D)] refers to 'the prompt disposition' of a motion. It does not state that 'disposition' means an

order of the district court."); *Thomas*, 788 F.2d at 1257 (holding that "the motions were no longer under active consideration" once the magistrate issued his report).

These courts rightly reason that the Speedy Trial Act is intended to govern magistrate judges just as it does other judges. *See Mora*, 135 F.3d at 1356 (rejecting argument that 30-day consideration limit should not apply to magistrate judges, because it would require the court "to hold that magistrate judges are not a part of the district court for purposes of the Act"); *Long*, 900 F.2d at 1275 ("We see no reason to exempt magistrates from the statutory limit of 30 excludable days for taking a motion under advisement after receiving all materials needed to decide it."). Accordingly, magistrate judges must be subject to the 30-day limit on automatically excludable time while they "actually [have the motion] under advisement." 18 U.S.C. § 3161(h)(1)(H); *Long*, 900 F.2d at 1275.

As the Second Circuit has recognized, subsections (h)(1)(H) and (h)(1)(D) "work in tandem: 'Congress intended that the time between making the motion and finally submitting it to the court for decision be governed by [(D)], and that the time during which the court has the motion 'actually under advisement' be governed by [(H)]." App. 110a; *Henderson v. United States*, 476 U.S. 321, 328-29 (1986). A judge's issuance of a decision on the motion, then, ends the period excludable under § 3161(h)(1)(H) and also amounts to a disposition of the motion under § 3161(h)(1)(D).

The *Oberoi* court agrees with this conclusion, but its subsequent reasoning puts the opinion at odds

with itself. Once the issuance of the magistrate judge's report ends the excludable periods under § 3161(h)(1)(H) and § 3161(h)(1)(D), the speedy trial clock begins to run. Some independent basis must then be given for it to stop. The *Oberoi* court's notion that the magistrate judge's report "re-files" the motion with the court is not only at odds with the text of the act, as discussed above, but completely inconsistent with its reason for restarting the clock in the first place. On the one hand, the *Oberoi* court holds that the clock re-starts because the magistrate judge's report disposes of the motion—a conclusion that makes perfect sense in light of the text and purpose of the Act, and with which every circuit to consider the issue has agreed. But, on the other hand, it holds that the magistrate judge's report stops the clock because, rather than dispose of the motion, the report "re-files" it with the trial court. App. 34a. This second conclusion makes no sense; either the magistrate judge's report does or does not dispose of the motion for Speedy Trial Act purposes. It cannot do both.

Rather, the action required to stop the clock is the filing of objections, because this requires the court to consider the findings objected to *de novo*. Although it is, of course, true that a magistrate's report does not become binding until the district court enters an order, the Speedy Trial Act is not drafted so narrowly as to cover only final legally binding orders. As the Eighth Circuit observed in *Long*: "Section 3161(h)(1)[(D)] refers to 'the prompt disposition' of a motion. It does not state that 'disposition' means an order of the district court." *Long*, 900 F.2d at 1274-75. In fact, as discussed above, the *Long* and *Oberoi* courts relied on this very fact to justify applying

(h)(1)(H)'s 30-day limit on excludable time to magistrate judges in the first place.

That the magistrate judge's decision restarts the speedy trial clock is confirmed by the legislative histories of the Speedy Trial Act and the Federal Magistrates Act. Both statutes were enacted to facilitate efficient, speedy trials—the Speedy Trial Act by imposing strict limits on the number of days between filing of an indictment and the beginning of trial, and the Federal Magistrates Act by enabling magistrates to take on matters that would otherwise occupy trial judges' time. H. REP. NO. 96-390, at 3 (1979), *reprinted in* 1979 U.S.C.C.A.N. 805, 807; S. REP. NO. 94-625, at 5 (1976). The history of the 1979 Speedy Trial Act amendments emphasizes that these two pieces of the federal justice system must work together to ensure the orderly administration of justice. For example, in answers submitted to questions posed by the Senate Judiciary Committee, the Assistant Attorney General stated:

> Indeed there is every reason to believe the backlog [of cases in the federal judiciary] will persist absent a broad-based package of reform measures: . . . the magistrates and arbitration provisions which will provide alternative means for dealing with . . . cases thereby freeing judges for other matters; and the amendment of time limits imposed by the Speedy Trial Act.

The Speedy Trial Act Amendments of 1979: Hearing on S. 961 and S. 1028 Before the S. Comm. on the Judiciary, 96th Cong. 156 (1979) (statement of Patricia M. Wald, Asst. Atty. Gen.); *see also id.* at 102, 108, 478, and 494.

By holding that a magistrate judge's report and recommendation merely re-files the motion in the district court, the Second Circuit's decision conflicts with the objectives of both the Speedy Trial Act and the Federal Magistrate Act. Decisions like *Oberoi* mean, in practice, that rather than being a means to accomplish the purposes of the Speedy Trial Act, magistrate judges become a tool for circumventing the Act, effectively doubling the time allowed to consider a motion. *See Thomas*, 788 F.2d at 1257 (rejecting such an interpretation because it "doubt[ed] that Congress meant to afford an all-but-automatic doubling of the statutory time"). Congress spent a great deal of time contemplating and adjusting the precise number of days allowed under the Speedy Trial Act, finally arriving at 70. But, the Second Circuit's approach would automatically add at least 10 days to this carefully-crafted limit every time a judge decides to refer a motion to a magistrate. Such an unjustified extension of the Speedy Trial Act's limits is contrary to the entire purpose of the Act and undermines Congress's careful calibration of the time limits under the Act.

The Second Circuit's approach also derides the decision-making authority and judicial role that Congress intended to confer upon magistrate judges. The 1976 amendments to the Federal Magistrates Act were intended as a "clarification of the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under general supervision of the court, shall serve as an officer of the court." S. REP. NO. 94-625, at 3 (1976). The magistrate judge plays a potentially dispositive role in pretrial criminal proceedings: "[i]f neither party contests the magistrate's proposed

findings of fact, the court may assume their correctness and decide the motion on the applicable law." H. REP. NO. 94-1609, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6163. The Second Circuit's interpretation of § 3161(h)(1) creates unnecessary and unwarranted tension between the important role of magistrate judges and the requirements of the Speedy Trial Act.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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April 14, 2009

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

Submitted: April 22, 2008
Decided: October 23, 2008
Docket No. 04-4545-cr

- -x

UNITED STATES OF AMERICA,

Appellee,

- v.-

TEJBIR S. OBEROI,

Defendant-Appellant.

- -x

Before: JACOBS, Chief Judge, KEARSE, KATZMANN, Circuit Judges.

Tejbir Oberoi appeals from his conviction in the United States District Court for the Western District of New York (Arcara, J.), chiefly on the ground that he was denied a speedy trial. We affirm.

TEJBIR OBEROI, pro se.

STEPHAN J. BACZYNSKI, Assistant United States Attorney (Terrance P. Flynn, United States Attorney for the Western District of New York, on the brief), for Appellee.

DENNIS JACOBS, Chief Judge:

Defendant-appellant Tejbir Oberoi appeals on speedy trial grounds the judgment of conviction entered against him on two offenses following a guilty plea in the United States District Court for the Western District of New York (Arcara, J.). The filing of the felony complaint, on October 14, 1999, was followed by unusually event-filled pretrial proceedings, including three interlocutory appeals, hearings concerning bail (26 days), competency proceedings, and several switches of defense counsel before Oberoi elected to represent himself. Trial began on January 12, 2004. Two days later, Oberoi pled guilty.

On appeal, Oberoi (who continues *pro se*) alleges two violations of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174: (1) pre-indictment delay exceeding 30 days, and (2) pretrial delay exceeding 70 days. While this appeal was pending, the Supreme Court decided

Zedner v. United States, 547 U.S. 489 (2006), which emphasized that the Speedy Trial Act serves the public's interest in efficient justice, and is not solely for the protection of the defendant or the mutual convenience of the defendant and prosecution. *Zedner*, 547 U.S. at 501-02. *Zedner* teaches that formal and transparent procedural measures must be taken with regard to every delay that is not automatic under the statute. *Id.* at 506-07. Oberoi cites several formal deficiencies in how the district court and magistrate judges considered and announced delays in his case. Having considered these deficiencies, we conclude that both the pre-indictment and pretrial delay were nonetheless permissible under the Speedy Trial Act.

Oberoi also challenges his plea as less than a knowing and voluntary waiver of his right to trial, contending that the district court's refusal to appoint new defense counsel on the eve of trial coerced him into pleading guilty. We reject that claim.

The judgment of conviction is affirmed.

BACKGROUND

Oberoi, a dentist in Buffalo, New York, defrauded insurance companies and employer dental plans by making false reimbursement claims for procedures he never performed. On October 14, 1999, the government filed a complaint charging Oberoi with mail fraud, 18 U.S.C. § 1341, and health care fraud, *id.* § 1347. On December 16, 1999, a grand jury

returned an indictment charging Oberoi with 34 counts of mail fraud, and 123 counts of making false statements in connection with health care benefits, *id.* § 1035(a)(2).

Procedural History

Oberoi was represented by seven defense attorneys, in succession and sometimes in tandem, before he eventually elected to represent himself. The changes in counsel led to three interlocutory appeals: two brought by Oberoi (challenging the district court's grant of defense counsel's withdrawal motion) and one brought by the Federal Defender (challenging the district court's denial of its withdrawal motion).

On June 10, 2003--a week before the trial was set to begin--Oberoi wrote to the district court seeking the discharge of his then-court appointed counsel, John Molloy, based on Molloy's repeated refusal to file a motion to dismiss on Speedy Trial Act grounds. At a conference on the eve of trial, Oberoi told the court that Molloy was unprepared for trial and had failed to provide adequate representation in the bail proceedings. The district court gave Oberoi the option of proceeding with Molloy as his counsel or appearing *pro se*, and warned Oberoi about the risks of appearing *pro se*.

On the morning of trial, Oberoi advised the district court that he would proceed without a lawyer. After further cautioning Oberoi about the

risks of self-representation, the district court found that Oberoi waived his right to counsel knowingly and voluntarily and directed Molloy to appear as stand-by counsel. During a subsequent recess in the proceedings, Oberoi complained of chest pains and was taken to the hospital. The district court dismissed 76 potential jurors and adjourned the trial to June 17, 2003.

On June 17, the district court again impaneled potential jurors, and Oberoi again complained of chest pains. The district court dismissed 82 potential jurors and ordered that Oberoi be examined for physical capacity to stand trial.

The physician's report stated that there was no physiological basis for Oberoi's complaints, but noted that Oberoi was unable to discuss his problems rationally. At a status conference on July 10, 2003, the district court found that Oberoi was physically fit to stand trial. However, in light of the notation about Oberoi's irrationality, the district court committed Oberoi for a psychiatric evaluation. The court assigned Molloy to represent Oberoi in the competency proceedings.

The psychologist reported that he was unable to reach a conclusion as to Oberoi's competency to stand trial, opining that Oberoi suffered from post-traumatic stress disorder as a consequence of his arrest and incarceration. At a subsequent status conference (on September 23, 2003), the government and Molloy agreed that a second opinion was

warranted in view of the inconclusive report. The second doctor (this one a psychiatrist) diagnosed chronic adjustment disorder, and concluded that Oberoi was competent to stand trial.

On November 14, 2003, the district court ruled that Oberoi was mentally competent to stand trial. The court relieved Molloy as counsel and reassigned him as Oberoi's stand-by counsel for trial, which was then scheduled to begin on January 6, 2004.

While the competency proceedings were pending, Oberoi moved *pro se* to dismiss the indictment for violations of two Speedy Trial Act requirements: that an indictment be filed within 30 days of an arrest, and that trial begin within 70 days of an indictment. The district court denied the motion on December 11, 2003. *United States v. Oberoi*, 295 F. Supp. 2d 286 (W.D.N.Y. 2003). The detailed opinion analyzed each challenged time period "with a running tally as to the number of non-excluded speedy trial days at the end of each period." *Id.* at 291. The district court concluded that Oberoi had waived his challenge to the government's pre-indictment delay. Oberoi's defense counsel "twice requested that the filing of the indictment be delayed so that he could conduct pre-indictment discovery and discuss with the government a possible plea disposition." *Id.* at 307. The district court reasoned that Oberoi "requested the continuances, and the resulting delay did not subvert the ends of justice," and so Oberoi was "precluded under the exception to the non-waiver

rule from now asserting a Speedy Trial Act violation for the period of the continuances." *Id.*

As to the post-indictment period, the district court concluded that much of the delay was subject to the self-executing provisions of the Speedy Trial Act, *see* 18 U.S.C. § 3161(h)(1), and that much of the rest was (as we discuss more fully below) attributable to the preparation of defense motions and had been excluded properly by the magistrate judge as "delay resulting from any pretrial motion." 18 U.S.C. § 3161(h)(1)(F). In total, the district court counted no more than 20 days elapsed on Oberoi's speedy trial clock. *Oberoi*, 295 F. Supp. 2d at 306.

The Trial and Guilty Plea

The parties appeared for trial on January 12, 2004. After a day of jury selection, Oberoi advised the district court that he had decided to plead guilty. He explained that he was "positive, 110 percent positive" that the prosecution would be dismissed due to pre-indictment delay. After a lengthy colloquy, the district court determined that Oberoi's decision to plead guilty was made without coercion.

Oberoi entered a plea agreement with the government. In exchange for his plea to one count of mail fraud and one count of making a false statement in connection with a healthcare matter, the government agreed to dismiss the remaining 155 counts in the indictment. Oberoi reserved the right to appeal on Speedy Trial grounds. On January 15,

2004, Oberoi pled guilty pursuant to the agreement. The district court found Oberoi competent and capable of entering an informed plea, and that his plea was knowing, voluntary and supported by the facts.

Oberoi was sentenced principally to 63 months of imprisonment and three years of supervised release. He was released from prison on February 12, 2008. In this Court, Oberoi filed more than a dozen motions (seeking stand-by counsel, bail pending appeal, and extensions of time, among other forms of relief), and numerous motions for reconsideration, which delayed the assignment of his appeal to a panel for nearly four years.

DISCUSSION

The Speedy Trial Act mandates the "dismissal of charges against a defendant who is not indicted, arraigned, or brought to trial within periods of time set forth in the statute." *United States v. Gaskin*, 364 F.3d 438, 451 (2d Cir. 2004). No more than 30 days can pass between arrest and indictment, and no more than 70 days between indictment and the start of trial--except that the Act contemplates the exclusion of certain periods of delay (described below) from the calculation. *See* 18 U.S.C. § 3161(b) and (d)(2). This appeal presents several questions about those statutory exclusions, as applied to both pre-indictment and pretrial delay.

"We review the district court's findings of fact as they pertain to a speedy trial challenge for clear error and its legal conclusions *de novo*." *Id.* at 450.

I

Oberoi was arrested on a felony complaint on October 18, 1999; he was indicted by a grand jury on December 16, 1999--in all, after 58 days had passed. Oberoi argues that this pre-indictment delay violated the 30-day time limit for the government to seek an indictment because the earlier-filed complaint pleaded the same "such charges." 18 U.S.C. § 3161(b).[1] In that event, the Act provides that "such charge against that individual contained in such complaint shall be dismissed or otherwise dropped." *Id.* § 3162(a)(1). Dismissal can be with or without prejudice, *id.*, but the latter "is not a toothless sanction: it forces the Government to

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[1] The Speedy Trial Act provides, in relevant part:

> Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161(b).

obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds." *United States v. Taylor*, 487 U.S. 326, 342 (1988).

Two pre-indictment delays occurred here. On November 5, 1999 (seventeen days after Oberoi's arrest), the parties appeared before Magistrate Judge Carol Heckman and jointly sought an adjournment of the first preliminary hearing in order to allow for pre-indictment discovery. The adjournment was granted until December 1, 1999. No reference was made to the Speedy Trial Act. (The exchange is set out in the margin.[2]

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[2] At the November 5 conference, John Rogowski represented the government and Jack Danzinger represented Oberoi.

> MR. ROGOWSKI: Your Honor, the matter was scheduled for preliminary hearing. Pursuant to discussions with Mr. Danzinger and Mr. Greenman, we have agreed to mutually request an adjournment. It's the first adjournment of the preliminary hearing. We have engaged in some preindictment discovery, and we intend to continue to do so in the meantime, Judge.
>
> THE COURT: Okay. How long of an adjournment are you requesting?
>
> MR. ROGKOWSKI: Thirty days, your Honor.

At the December 1, 1999 conference, the parties requested "an additional two-week period in which to conduct pre-indictment discovery along with some possible discussions concerning a disposition." Tr. 12/1/99 (District Ct. Docket # 305). Oberoi's defense counsel advised that "it would be in the interests of justice" to delay the preliminary hearing, so that he could review the substantial discovery materials produced by the government. *Id.* Magistrate Judge Heckman asked whether the parties had any objection to "excluding the time in the interests of justice." *Id.* The parties did not. Fifteen days after the conference, Oberoi was indicted.

A

> THE COURT: Okay. That's agreeable to the defense, I assume?
>
> MR. DANZINGER: That's correct, your Honor.
>
> THE COURT: Okay. How is December 1st at 9 o'clock?
>
> MR. DANZINGER: That's fine.
>
> . . .
>
> MR. ROGKOWSKI: That's fine, your Honor.

Tr. 11/5/99 (District Ct. Docket # 304).

While Oberoi's appeal was pending, the Supreme Court decided *Zedner v. United States*, 547 U.S. 489, (2006), which rejected a defendant's prospective waiver of the Speedy Trial Act. "Conspicuously, § 3161(h) has no provision excluding periods of delay during which a defendant waives the application of the Act, and it is apparent from the terms of the Act that this omission was a considered one." *Id.* at 500. The Act expressly contemplates waiver that is retrospective. 18 U.S.C. § 3162(a)(2) ("Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section."); *see also United States v. Abad*, 514 F.3d 271, 274 (2d Cir. 2008) (per curiam). From this, the Supreme Court inferred that retrospective waiver is permissible, whereas prospective waiver is not. *Zedner*, 547 U.S. at 502-03.

"The purposes of the Act also cut against exclusion on the grounds of mere consent or waiver." *Zedner*, 547 U.S. at 500. While it protects "a defendant's right to a speedy trial," the Speedy Trial Act was "designed with the public interest firmly in mind." *Id.* at 501. The legislative history bespeaks the congressional goal of "reducing defendants' opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment." *Id.* Given that "defendants may be content to remain on pretrial release, and indeed may welcome delay," the Supreme Court deemed it "unsurprising that

Congress refrained from empowering defendants to make prospective waivers of the Act's application." *Id.* at 501-02.

The government in *Zedner* pointed out that the defendant's "express waiver induced the district court to grant a continuance without making an express ends-of-justice finding," and argued that "basic principles of judicial estoppel" should preclude the defendant "from enjoying the benefit of the continuance, but then challenging the lack of a finding." *Id.* at 503.

The Supreme Court declined to apply judicial estoppel because the defendant's earlier "position" (seeking a continuance) was not "clearly inconsistent" with his position on appeal (invoking the Speedy Trial Act). *Id.* at 504-06 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). The defendant sought the continuance after signing a blanket prospective waiver of the Speedy Trial Act. The parties' discussion about the continuance request "did not focus on the requirements of the Act," because the parties (and the district court) "proceeded on the assumption that the court's waiver form was valid and that the Act could simply be disregarded." *Id.* at 506. So "the best understanding of the position taken" by the defendant was "that granting the requested continuance would represent a sound exercise of the trial judge's discretion in managing its calendar. This position was not 'clearly inconsistent' with [the defendant's] later position

that the continuance was not permissible under the terms of the Act." *Id.*

On this appeal, the government reads *Zedner* broadly (and against interest) to "reject[ ] the notion that a defendant can be estopped from asserting a Speedy Trial Act violation absent deceit or fraud." We read *Zedner* more narrowly, to say that a defendant is estopped by virtue of obtaining a continuance only if notice is taken of the Speedy Trial Act.

The formal and transparent procedural measures described in *Zedner* were not taken here. At the November 5, 1999 conference, the parties "did not focus on the requirements of the Act." *Zedner*, 547 U.S. at 506. Indeed, the Act was "simply . . . disregarded"--there was no notice taken of the "ends of justice" or any other possible ground for an exclusion of time. *Id.* As a result, Oberoi's earlier position (ignoring the Speedy Trial Act) is not "clearly inconsistent" with his later position (invoking the Speedy Trial Act). Under these circumstances, Oberoi is not judicially estopped from challenging the pre-indictment delay under the Speedy Trial Act, even if that delay was attributable to his counsel's request for an adjournment.

However, the Act "requires dismissal only of '*such* charge against the individual contained in *such* complaint.'" *United States v. Napolitano*, 761 F.2d 135, 137 (2d Cir. 1985) (quoting 18 U.S.C. § 3162(a)(1)). "*Napolitano* instructs that this language

must be read strictly." *Gaskin*, 364 F.3d at 451. We therefore do not "dismiss an untimely indictment pursuant to § 3162(a)(1) if it pleads different charges from those in the complaint." *Id.* This is true "even if the indictment charges 'arise from the same criminal episode as those specified in the original complaint or were known or reasonably should have been known at the time of the complaint.'" *Id.* (quoting *Napolitano*, 761 F.2d at 137). The test for determining whether a charge in an indictment was "contained" in an earlier-filed complaint is as follows:

> [W]hen a complaint charge and an indictment charge involve overlapping or even identical facts, dismissal is not warranted under § 3162(a)(1) if the indictment charge requires proof of *elements distinct from or in addition to* those necessary to prove the crimes pleaded in the complaint. Under such circumstances, the charge in the indictment is simply not 'such charge' as was pleaded in 'such complaint.'

Id. at 453 (quoting *Napolitano*, 761 F.2d at 137 (emphasis added)). (This is similar to the *Blockburger* test for double jeopardy, which we discuss in the margin.[3]

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[3] *Blockburger* looks in both directions--it asks whether each count "requires proof of an additional fact which the other does

For example, in *Gaskin*, the untimely indictment charged marijuana possession whereas the complaint had charged only the attempt. Both are violations of the same statute--21 U.S.C. § 846--but the drug possession charge in the indictment "require[d] proof of a fact not necessary to prove the complaint charge of attempted possession, namely, defendant's actual or constructive possession of marijuana." *Id.* Because the two were not the same "such charge," the Speedy Trial Act did not require dismissal of the untimely indictment. *Id.*; *see also United States v. Bailey*, 111 F.3d 1229 (5th Cir. 1997) (denying Speedy Trial relief to defendant initially charged with misdemeanor possession of a stolen firearm and indicted more than 30 days later on felony possession of the same weapon; the additional element required to prove the felony--that the stolen firearm had a value of $100 or more-meant the indictment and complaint charges were not the same).

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not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The Speedy Trial Act looks in one direction--it asks whether the "indictment charge requires proof of elements distinct from or in addition to those necessary to prove the crimes pleaded in the complaint." *Gaskin*, 364 F.3d at 453. Thus double jeopardy bars a second prosecution for a lesser included offense whereas the Speedy Trial Act does not bar untimely "greater indictment charges with lesser-included complaint charges." *Id.*

Here, the complaint charged that between December 1992 and February 1999, Oberoi did:

> (1) knowingly and unlawfully devise a scheme to defraud and to obtain money and property from various insurance companies and health benefit programs by means of false and fraudulent pretenses and representations utilizing the U.S. Postal Service, and
>
> (2) beginning on or about August 21, 1996 and continuing to the present, knowingly and willfully execute a scheme to defraud health care benefit programs and obtain money and property from health care benefit programs by means of false and fraudulent pretenses and representations, in violation of 18 U.S.C. § 1341 and 1347.

The indictment charged Oberoi with 34 counts of mail fraud (based on false reimbursement claims), 18 U.S.C. § 1341, and 122 counts of making false statements in connection with health benefits, *id.* § 1035. Oberoi pled guilty to one count of each. The remaining counts were dismissed on the government's motion.

The § 1035 counts were fresh to the indictment and therefore raise no overlap issue. But we do need to consider the overlap of mail fraud counts. The complaint and the indictment both charged mail fraud in violation of 18 U.S.C. § 1341, the generic elements of which do not vary from count to count. *See United States v. Walker*, 191 F.3d 326, 334 (2d

Cir. 1999) (identifying elements of mail fraud as "(1) a scheme to defraud victims of (2) money or property, through the (3) use of the mails"). The single mail fraud count to which Oberoi pled guilty is count 29. So the question becomes whether count 29 is the same "such charge" as any of the charges "contained" in the complaint. 18 U.S.C. § 3162(a)(1).

Count 29 is specific in terms--it charged Oberoi with submitting a fraudulent claim to the Niagara Mohawk employer dental plan (administered by Cigna) on December 24, 1995, for osseous surgery on patient "CD 7388." The complaint makes no reference to that particular mailing, or to that particular patient or to that particular employer dental plan; neither does the affidavit attached to the complaint (and made a part thereof), which lists scores of mailings and specifies the patients and plans for each. We need not define what features would make two charges the same for purposes of the Speedy Trial Act; it is enough that, here, the specific offense to which Oberoi pled guilty does not appear in the complaint. Accordingly, the Speedy Trial Act does not require the dismissal of either count of conviction as a result of pre-indictment delay.

B

The government argues in passing that the Speedy Trial Act error, if any, was harmless. However, *Zedner* forecloses harmless error review of a district court's failure to exclude time under the

Speedy Trial Act. *Zedner*, 547 U.S. at 507-09. A "straightforward reading" of the statutory wording supports that conclusion. *Id.* at 508. So does logic: "[a]pplying the harmless-error rule would . . . tend to undermine the detailed requirements of the provisions regulating ends-of-justice continuances." *Id.* The Supreme Court was also wary of depriving the Act of its bite-after all, a harmless error "approach would almost always lead to a finding of harmless error because the simple failure to make a record of this sort is unlikely to affect the defendant's rights." *Id.* at 509. And once one takes account of the public interest in a speedy trial, the government's argument founders on the question: harmful to whom?

The same concerns militate against applying harmless error analysis to the magistrate judge's failure to stop the pre-indictment speedy trial clock. It is hard to imagine a circumstance in which pre-indictment delay of only a few days would be anything other than harmless.

II

Oberoi points to 28 discrete periods of post-indictment delay for a total of 1,487 days that he claims were not properly excluded under the Speedy Trial Act, and that far exceed the 70-day time limit set by the Speedy Trial Act as follows:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an

> information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1).

A considerable amount of time elapsed while Oberoi's various defense lawyers prepared to file pretrial motions. The magistrate judges assigned to oversee the pretrial proceedings excluded that time pursuant to 18 U.S.C. § 3161(h)(1)(F), which stops the clock for the "delay resulting . . . from the filing of [a pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion." *Id.* In short, the magistrates invoked the statutory exclusion--for the period between filing and disposition of a motion--to exclude the time spent preparing the motion for filing. Absent those exclusions, more than 70 days would have elapsed on Oberoi's speedy trial clock. The propriety of excluding time for preparing motions is a substantial question.

A

The Speedy Trial Act contemplates that

> [t]he following periods of delay *shall be excluded* in computing the time within which an

information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from *other proceedings concerning the defendant,* including but *not limited to*--
>
> . . .
>
> (F) delay resulting from *any pretrial motion, from the filing* of the motion *through the conclusion* of the hearing on, or other prompt disposition of, such motion;
>
> . . .
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.
>
> . . .
>
> (8)(A) *Any period of delay* resulting from a *continuance* granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, *if* the judge granted such continuance on the basis of his *findings* that the *ends of justice* served by taking such action *outweigh* the *best interest of the public and the defendant in a speedy trial.* No such period of delay

> resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either *orally or in writing, its reasons* for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h) (emphases added).

There is consensus among the circuits that motion preparation time may be excluded in the interests of justice, pursuant to § 3161(h)(8)(A), so long as the judge makes a contemporaneous prospective finding that such an exclusion is warranted. *See, e.g., United States v. Jarrell*, 147 F.3d 315, 318-19 (4th Cir. 1998) (exclusion of motion preparation time, if supported by oral or written findings that a continuance serves the ends of justice, is consistent with the language of the Speedy Trial Act); *United States v. Fields*, 39 F.3d 439, 443 (3d Cir. 1994) (Section 3161(h)(8)(A) justified a continuance for preparation of motions where district court stated that such a continuance was necessary to enable defense counsel to investigate and prepare pretrial motions); *United States v. Butz*, 982 F.2d 1378, 1380-81 (9th Cir. 1993) ("We have upheld the exclusion of time for a continuance to allow defense counsel time to prepare motions."); *United States v. Thompson*, 866 F.2d 268, 273 (8th

Cir. 1989) (exclusion of motion preparation time warranted under § 3161(h)(8)(A)); *United States v. Monroe*, 833 F.2d 95, 100 (6th Cir. 1987) (same).

No published opinion in this Circuit decides that question, and in any case the exclusions here were made under subsection § 3161(h)(1), not § 3161(h)(8)(A). This appeal therefore turns on the question whether time can be excluded for the preparation of motions under subsection (h)(1). The circuits that have considered that question disagree. Several circuits have held that the delay attributable to motion preparation can be excluded under subsection (h)(1). *See United States v. Mejia*, 82 F.3d 1032, 1035-36 (11th Cir. 1996) ("[C]ourts have concluded that the time given for filing potential pretrial motions is excluded under 18 U.S.C. § 3161(h)(1) because the time given is 'delay resulting from other proceedings concerning the defendant.' Whether motions are actually filed during the extension is unimportant." (internal citations omitted)); *United States v. Lewis*, 980 F.2d 555, 564 (9th Cir. 1992) (finding "persuasive" decisions holding "that § 3161(h)(1) excludes from [Speedy Trial Act] calculations time that the trial judge expressly designates for the preparation of motions, even though the provision does not expressly cover such preparation time"); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 913 (10th Cir. 1989) ("We believe that a permissible addition to the list of proceedings that automatically toll the speedy trial clock would be a grant of time by the district court--

in response to a written or oral request by the defendant--for the preparation of written pretrial motions."); *United States v. Wilson*, 835 F.2d 1440, 1444 (D.C. Cir. 1987) ("[T]he trial court may exclude motion preparation time in its sound discretion."); *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985) ("[T]ime consumed in the preparation of a pretrial motion must be excluded--provided that the judge has expressly granted a party time for that purpose."); *United States v. Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982) ("Whether or not this additional delay fits within the language of § 3161(h)(1)(F), . . . it should be excluded.").

The Fourth and Sixth Circuits are of the opposite view. *See United States v. Jarrell*, 147 F.3d 315, 317-18 (4th Cir. 1998); *United States v. Moran*, 998 F.2d 1368, 1370-71 (6th Cir. 1993).

The circuits divide on the statutory wording. In considering the statutory exclusions of time, the Seventh Circuit observed that in "this as in other respects," the Speedy Trial Act is "an unsatisfactory piece of draftsmanship." *Tibboel*, 753 F.2d at 610. While the Act's legislative history "contains some, but equivocal, indication that all preparation time is includable (*i.e.*, part of the 70 days) unless the judge grants a continuance, the statute itself points in a different direction." *Id.* (internal citations omitted). To the Seventh Circuit, it is apparent from § 3161(h)(1)(F)

> that a proceeding on a pretrial motion is one of the "other proceedings" to which 3161(h)(1) refers; and while F itself refers only to the period between the filing of the motion and the disposition of it, and not to the period during which the motion is being prepared, section 3161(h)(1) is explicit that the particular intervals in subsections A through J are illustrative rather than exhaustive ("including but not limited to").

Id.; *see also Jodoin*, 672 F.2d at 238 (Breyer, *J.*) ("Clause (F) is but an illustration of the general language of § 3161(h)(1) . . . The 'time-for-filing' motion, if not part of the suppression motion, is directly related to it."); *Mobile Materials*, 871 F.2d at 913 ("The open-ended construction of section 3161(h)(1) and the invitation implicit in the legislative history of the Act cannot be ignored."). The Seventh Circuit concluded "that time consumed in the preparation of a pretrial motion must be excluded--provided that the judge has expressly granted a party time for that purpose." *Tibboel*, 753 F.2d at 610. This last qualification prevents abuse. Without it, either party "could delay trial indefinitely merely by working on pretrial motions right up to the eve of trial." *Id.*; *cf. United States v. Hoslett*, 998 F.2d 648, 657 (9th Cir. 1993) ("[T]he Speedy Trial Act does not permit the exclusion of all pretrial motion preparation time as a routine matter."). In reaching the same conclusion, the Tenth Circuit considered fairness and efficiency:

> Such a grant of time undoubtedly allows the accused to better pursue a defense and is therefore consistent with the objective of section 3161(h)(1). But it serves another salutary purpose as well. The grant allows the district court to dispose of the difficult question of whether the defendant's interests are better served by an uninterrupted march to trial or by a pause in proceedings at the defendant's request for the preparation of pretrial motions.

Mobile Materials, 871 F.2d at 913-14.

The circuits going the other way read the statutory wording as more restrictive. The Fourth Circuit observed that § 3161(h)(1)(F) automatically excludes the time while a motion is *sub judice*; however, the "[t]ime allotted for the preparation of a pretrial motion 'is conspicuously absent' from this provision." *Jarrell*, 147 F.3d at 317 (quoting *United States v. Hoslett*, 998 F.2d 648, 655 (9th Cir. 1993)). "Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)(F) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all." *Id.* The legislative history reinforced this reading: "'The Senate Committee on the Judiciary concluded that excluding time for the preparation of motions would be 'unreasonable,' noting that such 'time should not be excluded [when] the questions of law are not novel and the issues of fact [are] simple.'" *Id.* (quoting S. Rep. No. 96-212, at 34). Otherwise, the public interest would be

"denigrate[d] . . . by effectively allowing a defendant to relinquish his otherwise unwaivable right to a speedy trial." *Id.* at 318. The Sixth Circuit adopted a similar rationale. *See Moran*, 998 F.2d at 1371 ("The statute does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations. Moreover, the burden should not be on the defendant to take affirmative steps to keep the speedy-trial clock running.").

We join the sound majority of circuits holding that the time needed for the preparation of pretrial motions can be excluded under § 3161(h)(1). The Speedy Trial Act automatically excludes the "delay resulting from any pretrial motion, from the filing of the motion" until its prompt disposition by the court. 18 U.S.C. § 3161(h)(1)(F). Thus subsection (h)(1)(F) automatically stops the clock for preparation of response papers; why would the Act not likewise exclude the time for the preparation of the motion itself? We see no reason Congress would accommodate the needs of one party but not the other. The same interests and considerations that militate in favor of allocating time for a party to respond to a motion (and for a court to decide it) justify the allocation of time to prepare the motion in the first place, with this important caveat: the lower court must expressly stop the speedy trial clock, either on the record or in a written order.

This condition is critical. The automatic exclusions under the Act, *e.g.*, for deferral of

prosecution, *id.* § 3161(h)(1)(C), or an interlocutory appeal, *id.* § 3161(h)(1)(E), by their nature virtually always trigger district court docket entries that facilitate audits for compliance with the Speedy Trial Act (in the trial court and on appeal). A specific finding that time should be excluded for the preparation of pretrial motions would serve the same purpose: the creation of a docket entry.

In light of these considerations, we hold that the time for pretrial motions to be prepared can be excluded pursuant to subjection (h)(1), so long as the judge expressly stops the speedy trial clock for that purpose.[4]

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[4] Our holding coincides with prior Circuit practice. In 1979, the Second Circuit issued Guidelines Under the Speedy Trial Act, which specifically contemplated the exclusion of time for motion preparation:

> With respect to the motions [which the Court has determined require the filing of written papers], the time beginning with the date the Court determines that written papers are required and ending with the date of oral argument (or the due date of any post-argument submission) or, if there is to be no oral argument, the due date of the reply papers, is excluded as a proceeding concerning the defendant under § 3161(h)(1).

Guidelines Under the Speedy Trial Act 9-10 (1979). "While those guidelines do not have the force of law, they are entitled

B

The filing of a report and recommendation by a magistrate judge raises other close questions under the Speedy Trial Act. Here, a report and recommendation on a dispositive motion caused pretrial delay that Oberoi contends should be counted on the speedy trial clock. Two self-executing Speedy Trial Act provisions (discussed above) are relevant here. Subsection (h)(1)(F) automatically stops the clock when a pretrial motion is first filed; and after the motion is fully briefed, subsection (h)(1)(J) automatically stops the clock for up to 30 days while the motion is "under advisement by the court." 18 U.S.C. § 3161(h)(1)(J). These two subsections work in tandem: "Congress intended that the time between making the motion and finally submitting it to the court for decision be governed by (F), and that the time during which the court has the motion 'actually under advisement' be governed by (J)." *United States v. Cobb*, 697 F.2d 38, 43 (2d Cir. 1982), *abrogated on other grounds by Henderson v. United States*, 476 U.S. 321 (1986).

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to appropriate respect." *United States v. Todisco*, 667 F.2d 255, 260 (2d Cir. 1981) (per curiam).

When a pretrial motion is fully submitted to a magistrate judge, is the clock stopped (under subsection (h)(1)(J)) while the motion is "under advisement" of the magistrate judge?[5] When a magistrate judge issues a report and recommendation, is the pretrial motion effectively refiled with the district court, thereby stopping the clock pursuant to subsection (h)(1)(F)? Or does the issuance of a report and recommendation restart the

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[5] A subsidiary question (not raised by this appeal) is whether a magistrate judge and district court each enjoys an automatic 30-day "advisement" period, or if they instead share the same 30 days. *Compare United States v. Mora*, 135 F.3d 1351, 1357 (10th Cir. 1998) ("Reading the authority granted to the district judge in the Magistrate's Act to refer pretrial matters to the magistrate together with the requirements of the Speedy Trial Act, the most appropriate manner in which to effectuate the purpose of both statutes is to give the magistrate and district judge a separate thirty-day period for having the matter under advisement."), *and United States v. Mers*, 701 F.2d 1321, 1336 (11th Cir. 1983) ("We reject [the] argument that the thirty day under advisement exclusion is a total for both the magistrate and the district court."), *with United States v. Thomas*, 788 F.2d 1250, 1257 (7th Cir. 1986) (amended op.) ("If both judge and magistrate have 30 days, then in an ordinary case, with nothing more complex than a request for discovery of Brady materials, 60 days of automatic exclusion would be added to the 70 days provided by the Speedy Trial Act. We doubt that Congress meant to afford an all-but-automatic doubling of the statutory time.").

clock until a party files an objection? *See* 28 U.S.C. § 636(b)(1).

These questions are implicated by Oberoi's appeal and are open in this Circuit. The government did not brief these issues, aside from a (dubious) citation to *Henderson v. United States*, 476 U.S. 321, 326-27 (1986) (rejecting the argument that subsection (h)(1)(F) requires "that a period of delay" between the filing of and hearing on a motion be "reasonable").

Our sister circuits have considered these questions. A leading case is *United States v. Long*, 900 F.2d 1270 (8th Cir. 1990), which holds that once a pretrial motion has been fully briefed and submitted to a magistrate judge, subsection (h)(1)(J) gives the magistrate a 30-day "advisement" period in which to rule on the motion. *Long*, 900 F.2d at 1274-75. Then, "[t]he issuance of the report and recommendation [begins] a new excludable period under section 3161(h)(1)(F)." *Id.* at 1275. So,

> [t]he filing of the report and recommendation . . . in essence serves to re-file the motions, together with the magistrate's study of them, with the district court. Under section 3161(h)(1)(F), this filing tolls the 70-day count until the district court holds a hearing or has all the submissions it needs to rule on the motions.

Id. The Sixth Circuit subscribes to the *Long* approach, and in addition takes into account that the

law gives parties ten days to file objections to a report and recommendation:

> [A] new period of excludable delay under subsection (F) begins immediately upon the filing of the magistrate's report and recommendation. That period of excludable delay lasts only until the parties file objections or the ten days allowed for filing objections elapse. At that point-when the district court has before it all the materials it is due to receive--a new period of excludable delay begins; *viz.*, thirty days under subsection (J) within which a motion may be kept under advisement.

United States v. Andress, 943 F.2d 622, 626 (6th Cir. 1991). At least one other circuit follows *Long*. *See Mora*, 135 F.3d at 1356-57 (concurring that a "magistrate is subject to the thirty-day 'under advisement' period set forth in subsection (J)").

The Seventh and Eleventh Circuits take a slightly different tack: the issuance of a report and recommendation starts the clock; but the filing of objection automatically stops it. *See United States v. Thomas*, 788 F.2d 1250, 1257 (7th Cir. 1986) (amended op.) ("So . . . the clock started, just as it would have done if the judge rather than the magistrate had written the opinion. The difference is that the magistrate's recommendation was not final, which set the stage for a further exclusion if [the defendant] objected."). In other words, in the Seventh and Eleventh Circuits, the ten-day period

for filing objections is not excluded automatically. *See United States v. Robinson*, 767 F.2d 765, 769 (11th Cir. 1985) (stating, without explanation, that after a magistrate issued a report and recommendation on October 5, 1982, "[s]ix nonexcludable days elapsed between October 6, 1982 and October 12, 1982, when [the defendant] filed objections to the magistrate's recommendation"). The Seventh Circuit reasoned that once the magistrate judge issues a report and recommendation,

> [t]he motions [are] no longer under active consideration, not unless the defendant objected to the recommendations, which under the local rules he had ten days to do. These ten days are not automatically excluded; under *Tibboel* only time expressly granted by the court is excluded. Otherwise far too much time would be excluded, for in a sense every day that passes after the indictment is spent "preparing" things.

Thomas, 788 F.2d at 1257.

While this approach speeds things along, it seems to assume that a report and recommendation is a final disposition of a motion, rather than a document that "is automatically filed with the district court, which in turn is required to make a *de novo* determination on the issues to which a party objects." *Long*, 900 F.2d at 1275 n.3 (citing 28 U.S.C. § 636(b)(1)). Even if neither party files an objection to the report and recommendation, the motion itself is decided only after the district court rules. *See*

Mers, 701 F.2d at 1337 ("The magistrate's report, however, cannot automatically become the order of the court merely because none of the parties object.").

In light of this consideration, we adopt the *Long* approach. When a pretrial motion is fully submitted to a magistrate judge, subsection (h)(1)(J) affords the magistrate a 30-day "advisement" period in which to rule. The issuance of a report and recommendation automatically tolls the speedy trial clock under subsection (h)(1)(F) until ten days pass or objections are filed (whichever comes sooner). At that point, the complete package-the motion, report and recommendation, and any objections-is submitted to the district court. Whether that submission constitutes a fully-filed motion that automatically gives the district court a successive 30-day "advisement" period (*see* footnote 5, *supra*) is not, strictly speaking, an issue we need to resolve in this case, because by then Oberoi's speedy trial clock had been stopped by intervening events.

C

With this understanding of the Speedy Trial Act, we turn to the 28 periods of delay cited by Oberoi,

which are set out in the margin.[6] Many of these time periods are consecutive; and some of Oberoi's

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[6] Oberoi cites the following post-indictment periods of delay (with his count on the speedy trial clock shown in parentheses):

December 16 to December 22, 1999 (5 days)
December 22, 1999 to January 19, 2000 (28 days)
January 19 to February 23, 2000 (35 days)

March 9 to March 15, 2000 (5 days)
March 15 to April 12, 2000 (28 days)
April 12 to May 10, 2000 (28 days)
May 11 to June 28, 2000 (48 days)
June 28 to June 30, 2000 (2 days)
June 30 to July 31, 2000 (30 days)

November 7 to November 27, 2000 (10 days)

December 19 to December 20, 2000 (1 day)

December 20 to December 31, 2000 (10 days)
January 1 to January 11, 2001 (10 days)
January 11 to February 8, 2001 (28 days)

February 14 to March 8, 2001 (22 days)

August 2 to August 29, 2001 (27 days)
September 27 to October 12, 2001 (15 days)
October 12 to October 16, 2001 (3 days)

October 24 to November 1, 2001 (8 days)

February 13 to February 20, 2002 (7 days)

arguments overlap from period to period, as do some events relevant to the speedy trial calculation. In order to consider every plausible claim with regard to every time period arguably in issue, our analysis is broken into the longer intervals set out below.

For each interval, the header records the number of days elapsed on the speedy trial clock. If any part of a day is excluded, the day is not counted. Moreover, "[w]hen counting days for Speedy Trial Act purposes, the actual filing date of the motion[ ] and the date of the court's disposition are excludable." *United States v. Johnson*, 29 F.3d 940,

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February 20 to February 24, 2002 (4 days)

March 21 to April 14, 2003 (22 days)

September 18 to October 22, 2003 (32 days)
October 22 to November 5, 2003 (14 days)
November 5 to November 17, 2003 (12 days)
November 17 to December 11, 2003 (27 days)
December 11 to December 19, 2003 (8 days)

January 6 to January 12, 2004 (6 days)

App. Br. at C.

943 n.4 (5th Cir. 1994). This accounting principle is widely accepted.[7]

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[7] *See United States v. Fonseca*, 435 F.3d 369, 372 (D.C.Cir. 2006) ("[T]he period of exclusion begins on the day a pretrial motion is filed."); *United States v. Daychild*, 357 F.3d 1082, 1093 (9th Cir. 2004) (affirming position that "district courts are to 'calculate the 70-day period excluding the day the motion was filed and the day it was heard' ") (quoting *United States v. Aviles*, 170 F.3d 863, 869 (9th Cir. 1999)); *Gov't of Virgin Islands v. Duberry*, 923 F.2d 317, 320 n.8 (3d Cir. 1991) ("[W]e exclude the days on which the events occurred in making the 70-day calculation."); *United States v. Jodoin*, 672 F.2d 232, 237 n.7 (1st Cir. 1982) (Breyer, *J.*) ("[T]he Act states as to excludable days that both the day the motion is filed and the day it is disposed of shall be counted."); *see also United States v. Nixon*, 779 F.2d 126, 130 (2d Cir. 1985) (accepting defendant's concession that "the date on which pretrial motions were filed and decided[ ] is excludable"); Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended*, 106 F.R.D. 271, 289 (1984) (setting starting date of exclusion as "[d]ate the motion is filed or made orally" and the ending date as the "[d]ate on which the court has received everything it expects from the examiner and the parties before reaching a decision-that is, the date as of which all anticipated briefs have been filed and any necessary hearing has been completed"). *But see Thomas*, 49 F.3d at 256 ("It is the law in this circuit that only actual days elapsed between the filing of the motion and its disposition are counted.").

• **December 16, 1999 through December 22, 1999: Zero days**

The 70-day clock of the Speedy Trial Act begins to run from the date of indictment or "the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). Oberoi first appeared in court for his arraignment on December 22, 1999. Therefore no time elapsed on his speedy trial clock between December 16 and December 22, 1999.

• **December 22, 1999 through February 23, 2000: Five days**

At the arraignment, Magistrate Judge Heckman set a schedule for pretrial motion practice, with oral argument to be held on March 3, 2000. She then stated, "Time will be excluded until that date." Magistrate Judge Heckman made no factual findings in support of that statement, nor did she specifically explain the basis for the exclusion of time. Because the exclusion of time was not expressly granted for the preparation of pretrial motions, Oberoi's speedy trial clock began to run on December 23, 1999.

Five days later, the clock stopped. On December 28, 1999, Magistrate Judge Heckman entered an order directing the parties to file pretrial motions by February 23, 2000 (with responses due March 3, 2000). The order scheduled oral argument on the motions for March 10, 2000. Citing this Circuit's

Speedy Trial Guidelines, *Tibboel*, and *Jodoin*, Magistrate Judge Heckman stated that "the period of time from the date of this order until the date of oral argument is excluded under 18 U.S.C. § 3161(h)(1)(F)." Docket Entry # 6. Neither party objected to the scheduling order.

Subsection (h)(1)(F) applies when motions are filed, not while they are being prepared. Thus Magistrate Judge Heckman's citation does not meet the formal requisites of *Zedner*. But no interest protected by the Speedy Trial Act (and emphasized in *Zedner*) was disserved by the judge's addition of an unnecessary reference to the sub-sub-subsection of the sub-subsection that justifies the delay. The public interest in a speedy trial is unimpaired, and the time limits set in the Speedy Trial Act are not exceeded. In any event, the decision "must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)); *cf. United States v. Hammad*, 902 F.2d 1062, 1064 (2d Cir. 1990). The order stopped the speedy trial clock on December 28, 1999.

Some weeks later, the clock was stopped for a second, independent reason: on February 11, 2000, the government filed a motion to revoke bail. *See* 18 U.S.C. § 3161(h)(1)(F).

• March 9, 2000 through May 10, 2000: Ten days

Magistrate Judge Heckman orally granted the government's bail revocation motion at a hearing on March 9, 2000. At some point thereafter, Oberoi (through counsel) moved for reconsideration of Magistrate Judge Heckman's decision. The motion was never docketed in the district court, and so we have no way of knowing when (or how) the motion was filed. But on March 15, 2000, Magistrate Judge Heckman held a second bail hearing, and ruled for Oberoi. The transcript of the March 15 hearing is not in the record on appeal, and the docket sheet does not reveal whether Magistrate Judge Heckman stopped the speedy trial clock at the hearing.

On March 20, 2000, Magistrate Judge Heckman entered a second scheduling order, which directed the parties to file pretrial motions by May 10, 2000 (with responses due May 31, 2000) and scheduled oral argument on the motions for June 7, 2000. Again citing *Tibboel* and *Jodoin*, the magistrate excluded time from the date of the order (March 20) through the date set for oral argument (June 7) pursuant to 18 U.S.C. § 3161(h)(1)(F), and advised that if no motions were filed by May 10, 2000, the speedy trial clock would begin to run on that date.

Given the gaps in the record on appeal, we cannot determine how much time elapsed on the speedy trial clock between the March 9 bail revocation hearing and the March 20 scheduling order. But in no event was it more than ten days.

• May 11, 2000 through July 31, 2000: Twenty days

The parties filed no motions by the May 10 deadline. At a conference the following day, Magistrate Judge Heckman orally granted Oberoi's motion for additional time to prepare motions. The transcript of the conference is missing from the record on appeal; the docket does not suggest any exclusion of time. Accordingly, the speedy trial clock ran for one day: May 11, 2000.

On May 12, 2000, Magistrate Judge Heckman issued a third scheduling order directing the parties to file pretrial motions by June 28, 2000 (with responses due July 19, 2000) and set oral argument for July 26, 2000. Magistrate Judge Heckman again excluded time pursuant to 18 U.S.C. § 3161(h)(1)(F).

On June 1, 2000, Oberoi's case was referred to Magistrate Judge H. Kenneth Schroeder.

The parties missed the June 28 filing deadline. That day, Oberoi's defense counsel wrote to Magistrate Judge Schroeder seeking another extension. The letter made no reference to a Speedy Trial Act exclusion. On June 30, Magistrate Judge Schroeder granted the extension by memo endorsement, which also made no reference to a Speedy Trial Act exclusion. As a consequence, the clock began to run on June 29, 2000.

Nineteen days elapsed. On July 18, 2000, Magistrate Judge Schroeder directed the parties to file pretrial motions by July 31, 2000 and responses

by August 14, 2000, and set oral argument for August 23, 2000. As was Magistrate Judge Heckman's practice, Magistrate Judge Schroeder excluded the time from the date of the order (July 18) through the date set for oral argument (August 28) pursuant to 18 U.S.C. § 3161(h)(1)(F). Docket Entry # 29. For the same reasons stated above, the order stopped the clock.

• July 31, 2000 through December 20, 2000: Ten days

Oberoi filed pretrial motions on July 31, 2000, which automatically stopped the clock until October 18, 2000, when Magistrate Judge Schroeder held a hearing on the motions (which were by then fully briefed). 18 U.S.C. § 3161(h)(1)(F). The clock then stopped automatically for 30 days, until November 17, 2000, while the motions were under the advisement of the magistrate. 18 U.S.C. § 3161(h)(1)(J); *see also Long,* 900 F.2d at 1275 ("We see no reason to exempt magistrates from the statutory limit of 30 excludable days for taking a motion under advisement after receiving all materials needed to decide it.").

The motions were not decided within 30 days, and so Oberoi's speedy trial clock began to run on November 18. Nine days elapsed. On November 27, Magistrate Judge Schroeder issued an order extending the advisement period for thirty days,

until December 18, 2000, in the interests of justice. *See* 18 U.S.C. § 3161(h)(8)(A).

Magistrate Judge Schroeder issued his report and recommendation on the motions on December 20, 2000, adding one day of delay (December 19), making ten days for the period, and a running total of 45 days.

• December 21, 2000 through July 16, 2002: Zero days

The issuance of Magistrate Judge Schroeder's report and recommendation effectively re-filed the motions in the district court, and therefore automatically tolled the speedy trial clock under subsection (h)(1)(F). *See Andress,* 943 F.2d at 626 ("[A] new period of excludable delay under subsection (F) begins immediately upon the filing of the magistrate's report and recommendation.").

On January 11, 2001, Oberoi's counsel requested an extension to file objections. He stated that he received the report and recommendation on December 27, 2000, which (excluding holidays and weekends) set the due date for objections on January 11--the day the extension was sought. *See* 28 U.S.C. § 636(b)(1) (providing that objections are due "[w]ithin ten days after being served with a copy" of a report and recommendation). On January 12, 2001, the district court entered an order giving defense counsel until February 8, 2001 to file objections. The speedy trial clock remained stopped pursuant to

subsection (h)(1)(F), because the motion was not fully briefed. *See Henderson,* 476 U.S. at 331 (1986) ("The provisions of the Act are designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion.").

The filing of objections was overtaken by other procedural events. On February 5, 2001, the government filed a motion to revoke bail, which automatically tolled the speedy trial clock. Numerous bail revocation hearings were held. In the meantime, on May 22, 2001, the government filed a motion relating to discovery, which also automatically stopped the speedy trial clock. Oberoi did not respond. The government renewed the motion over a year later (on June 25, 2002). Oberoi never responded. Finally, at a hearing on July 16, 2002, the district court ruled on the motion. Subsection 3161(h)(1)(F) "exclude[s] all time between the filing of and the hearing on a motion whether that hearing was prompt or not." *Henderson,* 476 U.S. at 326. Notwithstanding that it was pending for nearly fourteen months, the government's May 22, 2001 discovery motion stopped the clock through July 16, 2002. *Cf. United States v. Bufalino,* 683 F.2d 639, 646 (2d Cir. 1982) (opining "that [the defendant], when faced with a government motion, had a duty to do more than stand by without taking a position and then reap the benefit of inaction by having the indictment dismissed on speedy trial grounds" because otherwise "neither the court nor its

clerk's office will ever know when the 'under advisement' period of subsection (J) begins to run").

• March 21, 2003 through April 14, 2003: Zero days

This period was properly excluded by the district court in the interests of justice, pursuant to 18 U.S.C. § 3161(h)(8)(A). At a pretrial conference on March 21, 2003, the district court found, and the parties agreed, that the time leading up to the next scheduled pretrial conference on April 11, 2003 should be excluded in the interests of justice in order to allow defense counsel to consult with his client and the government. 18 U.S.C. § 3161(h)(8)(A). At the April 11 pretrial conference, the parties requested another continuance, to May 6, 2003. The district court again excluded time in the interests of justice, making the requisite factual findings on the record. *Id.* Neither party objected to the exclusion. The district court documented these rulings in a speedy trial order issued on April 14, 2003.

• September 18, 2003 through December 11, 2003: Zero days

Between June 18 and November 14, 2003, the clock was automatically stopped while Oberoi was examined by various physicians, first to determine his physical capacity and then to determine his mental competency. 18 U.S.C. § 3161(h)(1)(A).

Meanwhile, on June 20, 2003 (while the competency proceedings were pending), Oberoi filed his motion to dismiss on Speedy Trial Act grounds, which automatically stopped the clock through December 11, 2003, when the district court denied the motion. 18 U.S.C. § 3161(h)(1)(F).

• December 12, 2003 through December 19, 2003 and January 6, 2004 through January 12, 2004: Twelve days

Oberoi challenges these intervals on appeal, but did not cite them in the district court. The Speedy Trial Act provides that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2). Even if Oberoi had raised these periods of delay, they would constitute only twelve additional days on the clock. Combined with the periods listed above, only 57 days could be counted on his speedy trial clock-fewer than the 70 allowed by the Act. Accordingly, Oberoi's claim is rejected.

III

Oberoi contends that his plea was invalid because the district court refused to appoint new defense counsel. Oberoi did not raise this claim in the district court, and so we review for plain error.

United States v. Glen, 418 F.3d 181, 184 (2d Cir. 2005).

A criminal defendant "has a constitutional right to waive the right to assistance of counsel and present [his] own defense *pro se*, if the decision is made 'knowingly and intelligently.'" *Clark v. Perez*, 510 F.3d 382, 394-95 (2d Cir. 2008) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). A defendant who intends to waive his right to counsel "need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." *Faretta*, 422 U.S. at 835. Nonetheless, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)). We have advised:

> To ensure the waiver is knowing and intelligent, a trial court should engage the defendant in an on-the-record colloquy. From defendant's answers and from its own observations, the trial court must be persuaded that the waiver is a rational one, and that defendant has the mental capacity to comprehend the consequences of relinquishing a constitutional right.

United States v. Schmidt, 105 F.3d 82, 88 (2d Cir. 1997).

In *Schmidt*, we rejected the defendant's claim that "she was coerced into self-representation because the district court, on the eve of trial, refused to replace her third court-appointed attorney." *Id.* at 89. As a general matter, a district court "may not compel defendant to proceed with incompetent counsel." *Id.* But "[b]ecause the right to counsel of one's choice is not absolute, a trial court may require a defendant to proceed to trial with counsel not of defendant's choosing." *Id.* And "[o]n the eve of trial, just as during trial, a defendant can only substitute new counsel when unusual circumstances are found to exist, such as a complete breakdown of communication or an irreconcilable conflict." *Id.* at 89.

Oberoi's challenge fails. The day before trial--after his case had been pending for nearly four years--Oberoi told the district court that he was dissatisfied with John Molloy, his seventh defense attorney. The district court advised Oberoi that Molloy was "a competent, capable, prepared lawyer," who had been working on the defense for over four months. *Cf. id.* at 89 (explaining that a district court "may not compel defendant to proceed with incompetent counsel"). The district court told Oberoi he could proceed with Molloy as his counsel or appear *pro se*, and then warned Oberoi about the risks of self-representation, including the layman's lack of familiarity with the rules of evidence and criminal procedure, court practices, and sentencing. The following day, the day trial was to begin, Oberoi

again requested new counsel. After the district court denied that request, Oberoi declared his intention to represent himself. The district court found that Oberoi waived his right to counsel knowingly and voluntarily, and directed Molloy to appear as stand-by counsel. Having reviewed the extensive colloquy conducted by the district court, we see no reason to disturb that ruling.

Nor do we see any reason to disturb the district court's finding that Oberoi's guilty plea was knowing and voluntary. The plea allocution conformed to Federal Rule of Criminal Procedure 11. The district court engaged Oberoi in a lengthy dialogue to determine the factual predicate for the plea. Oberoi stated that, "these two counts I am totally guilty." When the district court inquired into Oberoi's competence, Oberoi stated that he was "perfectly capable," and felt "absolutely all right" to plead guilty. Later, Oberoi assured the court, "No sir, nobody has forced me to plead guilty. Absolutely." Oberoi affirmed that he understood the consequences of pleading guilty and the rights he was giving up in not going to trial. The district court accepted the plea, finding that Oberoi was "fully competent and capable of entering an informed plea," and that the plea was knowing, voluntary and supported by an independent basis in fact. "The district court is entitled to accept a defendant's statements under oath at a plea allocution as true." *United States v. Maher*, 108 F.3d 1513, 1521 (2d Cir. 1997). Having considered the record as a whole, we

see no merit in Oberoi's claim that his guilty plea was coerced.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

V.

TEJBIR OBEROI, Defendant.

DECISION AND ORDER
No. 99-CR-197A

Dec. 11, 2003

ARCARA, District Judge.

INTRODUCTION

On June 20, 2003, defendant Tejbir Oberoi moved *pro se* to dismiss the instant Indictment based on an alleged violation of the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.* He filed supplemental material in support of his motion on June 24, 2003. The government filed a response opposing the motion on July 2, 2003. Defendant filed an affirmation and table in support of his motion on July 3, 2003. Defendant also filed supplemental reply memoranda on July 8, July 10, August 12, August 14, August 21, August 25, September 10, October 22 and October 24, 2003. In his October 22nd memorandum, defendant raised for the first time a claim that the indictment should also be dismissed under the Speedy Trial Act because of pre-indictment delay. The government filed a memorandum regarding the pre-indictment delay issue on November 4, 2003. Defendant filed reply memoranda thereto on November 5 and 13, 2003.[1] Oral argument on the motion to dismiss was held on November 12, 2003.

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[1] Defendant's November 13, 2003 memorandum was actually submitted to the Court on the morning of November 12, 2003, just before oral argument, but was not filed until November 13th.

After reviewing the submissions of the parties and hearing oral argument, the Court denies defendant's motion to dismiss.

DISCUSSION

A. *The Speedy Trial Act*

The Speedy Trial Act is designed to protect a defendant's constitutional right to a speedy trial and to serve the public interest in ensuring a quick resolution of criminal proceedings. *United States v. Breen*, 243 F.3d 591, 594 (2d Cir.) (citation omitted), *cert. denied*, 534 U.S. 894 (2001). The Act commands the government to bring criminal defendants to trial within 70 days of their first appearance before a judicial officer of the court or the filing of an indictment, whichever is later. *See* 18 U.S.C. § 3161(c)(1)[2]; *see also United States v. Anderson*, 902 F.2d 1105, 1108 (2d Cir.), *cert. denied*, 498 U.S. 867

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[2] 18 U.S.C. § 3161(c)(1) provides, in pertinent part:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged by . . . indictment shall commence within seventy days from the filing date (and making public) of the . . . indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

(1990). The 70-day deadline, however, is not absolute; 18 U.S.C. § 3161(h) excludes certain periods of delay from the 70-day calculation. The periods of delay defined in §§ 3161(h)(1)-(6), which include delays resulting from interlocutory appeals, pretrial motions and "other proceedings concerning the defendant," are automatically excluded from the Speedy Trial clock.[3] *See Henderson v. United States,* 476 U.S. 321, 327 (1986); *Anderson,* 902 F.2d at 1108; *United States v. Tunnessen,* 763 F.2d 74, 76 (2d Cir. 1985). Put differently, these sections of the Act are self-executing, *i.e.,* no specific finding or order by the court is required for the exclusions to apply, and the exclusions are not limited to delays that are reasonably necessary. *Henderson,* 476 U.S. at 329-30.

The Speedy Trial Act also excludes from the 70-day time limit any period of delay "resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of

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[3] Many courts have used the metaphor of a clock to keep track of periods of delay under the Speedy Trial Act. *See, e.g., United States v. Rodriguez,* 63 F.3d 1159, 1162 (1st Cir.) (noting use of the clock metaphor under the Speedy Trial Act), *cert. denied,* 516 U.S. 1032 (1995).

his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). Unlike §§ 3161(h)(1)-(6), § 3161(h)(8)(A) is not self-executing. No period of delay based on the "ends of justice" may be excluded under § 3161(h)(8)(A), "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice [would be] served" by granting the excludable delay. Subsection (h)(8)(B) contains a nonexclusive list of factors for the court to consider in deciding whether to grant a continuance under subsection (h)(8)(A). The court may not grant an ends-of-justice continuance under § 3161(h)(8)(A) *nunc pro tunc. Tunnessen,* 763 F.2d at 77. "[A]n ends-of-justice continuance [must] be prospective, not retroactive; an order granting a continuance on that ground must be made at the outset of the excludable period." *Id.* However, a court may enter its ends-of-justice finding after it grants the continuance if it is clear from the record that the court conducted the mandatory balancing contemporaneously with the granting of the continuance. *Id.* at 77-78.

If a criminal indictment is not brought to trial within the 70-day time limit imposed by § 3161(c)(1), as extended by operation of § 3161(h), the penalty provisions of the Speedy Trial Act mandate that "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). The

dismissal may be with or without prejudice. *Id.*; *Tunnessen*, 763 F.2d at 76.

B. *The Speedy Trial Clock has not Expired*

Defendant Oberoi contends that the 70-day Speedy Trial clock expired long ago in this case and that the Indictment must therefore be dismissed. The Court finds this contention without merit.

Preliminarily, the Court notes that although this case has been pending for nearly four years, an unusually long period of time, defendant does not dispute that the vast majority of the delay is properly excluded from the 70-day Speedy Trial clock.[4] For example, the government has filed six motions in this case to modify or revoke defendant's bail. Each government motion resulted in a more restrictive modification of release. In two instances, defendant's bail was revoked.[5] Hearings on the

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[4] The Court notes that on February 4, 2003, while this case was on interlocutory appeal, defendant's counsel at the time represented to the Second Circuit Court of Appeals that there was no speedy trial issue in this case. *See* Item No. 285.

[5] The first revocation was ordered on March 9, 2000, but the defendant was released again on bail on March 15, 2000. The second revocation was ordered on May 8, 2003, when the Court revoked bail pending a hearing. On May 30, 2003,

various bail revocation motions consumed several months. Defendant does not contest that all such periods between the filing of the bail revocation motions and the conclusion of the hearings and related submissions are excluded under 18 U.S.C. § 3161(h)(1)(F)[6], from computation of the Speedy Trial Act time. There have also been myriad other delays, including delays relating to three different defense attorney changes[7] and two separate interlocutory appeals to the Second Circuit Court of Appeals, to which defendant does not object.

Defendant's motion is limited to challenging a number of discrete time periods which he claims are not excluded or were not properly excluded under

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following an evidentiary hearing, the Court ordered the defendant detained pending trial.

[6] Section 3161(h)(1)(F) provides that "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" shall be excluded from the Speedy Trial calculation.

[7] During the course of this case, defendant has been represented by seven different attorneys, functioning either jointly or individually: Jack Danziger; Herbert Greenman; Mark Mahoney; Joseph Mistrett; Timothy Hoover; Kimberly Schechter; and John Molloy.

the Speedy Trial Act.[8] He claims that when these non-excluded periods of delay are added together, they result in significantly more than 70 days having run on the Speedy Trial clock. Each of the challenged periods will be discussed chronologically, with a running tally as to the number of non-excluded speedy trial days at the end of each period.

1. *Period of December 16, 1999 to December 22, 1999*

On October 14, 1999, the government filed a criminal complaint (99-M-88) charging defendant with mail fraud, in violation of 18 U.S.C. § 1341; and health care fraud, in violation of 18 U.S.C. § 1347. Defendant was arrested on October 18, 1999 and made an initial appearance on the complaint before Magistrate Judge Carol E. Heckman that same day. Defendant was released on his own recognizance.

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[8] Defendant challenges the excludability of the following periods of delay: December 16, 1999 to December 22, 1999; January 12, 2000 to February 11, 2000; March 9, 2000 to July 31, 2000; November 18, 2000 to November 27, 2000; December 19, 2000 to February 5, 2001; September 29, 2001 to October 16, 2001; October 24, 2001 to November 1, 2001; February 13, 2002 to February 20, 2002; and February 7, 2003 to February 20, 2003. Defendant does not dispute that all other periods of delay in this case are properly excluded.

On December 16, 1999, a federal grand jury returned a 157-count Indictment (99-CR-197), which charged defendant with 34 counts of mail fraud, in violation of 18 U.S.C. § 1341; and 123 counts of making false statements in connection with health care benefits, in violation of 18 U.S.C. § 1035(a)(2). Defendant appeared for arraignment on the Indictment on December 22, 1999, before Magistrate Judge Heckman, at which time he entered a plea of not guilty. *See* Government Exhibit No. 1.

Defendant contends that the five days between the Indictment being returned on December 16th and the arraignment on December 22nd is not excluded time under the Speedy Trial Act. The government does not contest defendant's position. Thus, the five-day period between December 16th and December 22nd is not excluded from the Speedy Trial clock.

5 DAYS NON-EXCLUDED: 65 REMAIN

2. *Period of January 12, 2000 to February 11, 2000*

At the December 22, 1999 arraignment, the government moved for detention of defendant pending trial. Magistrate Judge Heckman scheduled a hearing on the government's motion.

Also at the December 22, 1999 arraignment, defendant, through his then-counsel, Mr. Greenman, requested that he be given time to obtain and review

evidence provided by the government through voluntary discovery, as well as additional time to prepare and file pretrial motions. *See* Government Exhibit No. 1. The Magistrate Judge directed that all voluntary discovery be provided to the defendant by January 19, 2000, that defense motions be filed by February 23, 2000, that the government's response be filed by March 3, 2000, and that oral argument on the motions be held on March 8, 2000. *Id.* The Magistrate Judge then stated that the time up to the oral argument date would be excluded from the Speedy Trial clock. *Id.* at 9. Neither defendant nor his counsel objected.

The Magistrate Judge filed a written Scheduling Order on December 28, 1999. *See* Government Exhibit No. 2.[9] In the December 28th Scheduling

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[9] The docket entry for the December 28, 1999 Scheduling Order erroneously states that the defendant's motions were due February 3, 2000. The Scheduling Order itself and the transcript of the arraignment both reflect that defense motions were due by February 23, 2000.

The Court also notes that the December 28th Scheduling Order indicated that oral argument on defendant's pretrial motions would be held on March 10, 2000, but the transcript of the arraignment shows that the Magistrate Judge originally set March 8, 2000 as the date for oral argument. There is no explanation in the record for this change.

Order, the Magistrate Judge stated that the period of December 22, 1999 (the date of the arraignment) through March 10, 2000 (the date for oral argument on defendant's pretrial motions) is excluded from the computation of Speedy Trial Act time, pursuant to § 3161(h)(1)(F). *See* Government Exhibit No. 2. In support of the exclusion, the Magistrate Judge cited the following cases: *United States v. Piontek*, 861 F.2d 152, 154 (7th Cir.1988); *United States v. Montoya*, 827 F.2d 143, 153 (7th Cir.1987); *United States v. Wilson*, 835 F.2d 1440, 1444 (D.C.Cir. 1987); *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985), and *United States v. Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982). These cases all hold that the time period deemed necessary for the preparation of motions is properly excluded from the computation of Speedy Trial Act time. The Magistrate Judge also cited as authority for the exclusion the Second Circuit Judicial Council's Guidelines under the Speedy Trial Act (1979) ("Second Circuit Speedy Trial Guidelines"), Part I(C)(3)(a) and (b), which provide, in pertinent part, as follows:

> With respect to the motions [which the Court has determined require the filing of written papers], the time beginning with the date the Court determines that written papers are required and ending with the date of oral argument (or the due date of any post-argument submission) or, if there is to be no oral argument, the due date of the reply papers, is

excluded as a proceeding concerning the defendant under § 3161(h)(1).

On January 12, 2000, the Magistrate Judge held a hearing on the government's December 22nd detention motion. The Magistrate Judge granted, in part, the relief requested by the government, ordering the defendant to post cash bail and setting new terms and conditions of release.

On February 11, 2000, the government again moved for revocation of defendant's bail. That motion was disposed of on March 9, 2000.

Until the filing of the instant motion to dismiss, neither defendant nor his counsel ever objected to the December 28th Scheduling Order or the Magistrate Judge's finding therein that the time for preparing and filing pretrial motions was excluded, under § 3161(h)(1)(F). Now, for the first time, defendant contends that in the Magistrate Judge incorrectly held that the period of delay resulting from the preparation of pretrial motions is excluded under § 3161(h)(1)(F). Defendant argues that the plain language of § 3161(h)(1)(F) only excludes delay occurring after the filing of a pretrial motion and does not exclude delay resulting from preparation of the motion. He further argues that motion preparation time can only be excluded from the Speedy Trial clock if the court makes a contemporaneous ends-of-justice finding under § 3161(h)(8), which the court failed to do here. Thus, according to the defendant, the time between

January 12, 2000 and February 11, 2000 is not excluded.[10] The Court finds defendant's arguments without merit. Although the Court agrees with defendant that motion preparation time is not excluded under § 3161(h)(1)(F) as the Magistrate Judge held, it finds, as discussed below, that such time is automatically excluded under § 3161(h)(1).

Courts of Appeals have disagreed on whether delay attributable to the preparation of pretrial motions is automatically excluded under the general language of § 3161(h)(1). A number of circuit courts have held that such delays are excluded under § 3161(h)(1). *See, e.g., United States v. Mejia,* 82 F.3d 1032, 1035-36 (11th Cir.), *cert. denied,* 519 U.S. 872 (1996); *United States v. Lewis,* 980 F.2d 555, 564 (9th Cir. 1992); *United States v. Barnes,* 909 F.2d

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[10] Defendant only argues that the period from January 12, 2000 to February 11, 2000 is not properly excluded because the rest of the pretrial motion preparation time in the December 28th Scheduling Order is properly excluded under § 3161(h)(1)(F), due to the government motions relating to bail. Defendant concedes that the period from the arraignment on December 22, 1999 to January 12, 2000 is properly excluded, because the government moved for pretrial detention at the arraignment and that motion was resolved on January 12th. He also concedes that the time after February 11, 2000 is properly excluded because the government filed another detention motion on that date, which was ultimately decided on March 9, 2000.

1059, 1064-65 (7th Cir. 1990); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 913-14 (10th Cir. 1989); *Wilson*, 835 F.2d at 1444-45; *Jodoin*, 672 F.2d at 238. Relying on the general language in § 3161(h)(1), which excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to," those enumerated in subsections (A)-(J), these courts have reasoned that the phrase "including but not limited to" indicates that the particular time periods listed in subsections (A) through (J) are an illustrative rather than an exhaustive enumeration of those delays resulting from "other proceedings concerning the defendant."

In *Mobile Materials, Inc.*, 871 F.2d at 913-14, the Tenth Circuit found that § 3161(h)(1) is to be given an open-ended construction. Holding that a defense request for motion preparation time automatically tolls the Speedy Trial clock, the Tenth Circuit stated that:

> Such a grant of time undoubtedly allows the accused to better pursue a defense and is therefore consistent with the objective of section 3161(h)(1). But it serves another salutary purpose as well. The grant allows the district court to dispose of the difficult question of whether the defendant's interests are better served by an uninterrupted march to trial or by a pause in proceedings at the defendant's request for preparation of pretrial motions.

In contrast, at least two circuit courts have held that motion preparation time is not excluded under § 3161(h)(1). *See, e.g., United States v. Jarrell,* 147 F.3d 315, 317 (4th Cir.), *cert. denied,* 525 U.S. 954 (1998); *United States v. Moran,* 998 F.2d 1368, 1370-71 (6th Cir. 1993).[11] These courts have reasoned that Congress' decision not to include pretrial motion preparation time within the scope of delay excludable under § 3161(h)(1)(F), which excludes the time from the "filing" of motions to the conclusion of the hearing thereon, strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all.

There does not appear to be any Second Circuit case law directly addressing the issue of whether motion preparation time is automatically excluded under § 3161(h)(1). Defendant cites *United States v. Bufalino,* 683 F.2d 639 (2nd Cir.), *cert. denied,* 459 U.S. 1104 (1983), for the proposition that such time is not excluded for Speedy Trial Act purposes. However, defendant's reliance on *Bufalino* is

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[11] Although these courts held that motion preparation time in not automatically excluded under § 3161(h)(1), they both recognized that such time can be excluded in a particular case so long as the trial court makes a contemporaneous, prospective "ends-of-justice" finding under § 3161(h)(8). *Jarrell,* 147 F.3d at 318; *Moran,* 998 F.2d at 1371.

misplaced. In *Bufalino*, the government claimed that the entire period from when the defendant's counsel discussed the need to prepare motions (January 20th) and filed motions (motions filed March 24th and May 26th) to when the district court decided the motions (July 28th) was excluded under § 3161(h)(1)(F). The Second Circuit held that once motions are deemed submitted, the 30-day exclusion provided under 18 U.S.C. § 3161(h)(1)(J)[12] applies, not § 3161(h)(1)(F). *Id.* at 642. The court expressly declined to address the defendant's contention that § 3161(h)(1)(F) does not exclude motion preparation time. *Id.* at 645 n.7. Thus, *Bufalino* offers no definitive guidance regarding the excludability of motion preparation time.

Defendant further cites the Second Circuit's decision in *United States v. Matsushita,* 794 F.2d 46 (2d Cir. 1986) for the proposition that motion preparation time can only be excluded if there has been a contemporaneous ends-of-justice finding under § 3161(h)(8). However, defendant reads too much into *Matsushita.* In *Matsushita,* the district

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[12] Section 3161(h)(1)(J) excludes from the computation of the Speedy Trial Act time "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

court had made a contemporaneous, prospective ends-of-justice finding that a three-week period of delay for motion preparation, as requested by the defendant, was excludable under § 3161(h)(8). The Second Circuit held that this exclusion was correct. The Second Circuit did not hold, as defendant suggests, that motion preparation time is not properly excluded under § 3161(h)(1) or that such time can only be excluded under § 3161(h)(8). In fact, the Second Circuit did not even mention § 3161(h)(1).[13] Thus, *Matsushita* merely stands for the unremarkable proposition that a trial court may exclude time for pretrial motion preparation, as requested by the defendant, under § 3161(h)(8), so long as there is an appropriate ends-of-justice finding.[14]

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[13] This is not surprising in light of the fact that the Second Circuit determined that the time was properly excluded by the district court under § 3161(h)(8). Thus, there was no need for the Circuit to go any further.

[14] Defendant also cites *United States v. Adeniji*, 31 F.3d 58 (2d Cir. 1994) in support of his position. However, *Adeniji* is inapposite to the situation present here. That case involved the issue of whether a continuance was properly granted under § 3161(h)(8) to allow time for the defendant to interview witnesses for trial. It did not involve the issue of whether time is automatically excluded under § 3161(h)(1) for the preparation and filing of pretrial motions.

Although there is no Second Circuit case law regarding the issue of whether motion preparation time is excluded under § 3161(h)(1), the issue is addressed in the Second Circuit Speedy Trial Guidelines. As stated above, the Guidelines specifically provide that the time from when the trial court determines that written papers are required until the date of the oral argument is excluded under § 3161(h)(1). The Second Circuit has held that although these Guidelines do not have the force of law, they "are entitled to appropriate respect" in construing the Speedy Trial Act. *United States v. Todisco,* 667 F.2d 255, 260 (2d Cir. 1981), *cert. denied,* 455 U.S. 906 (1982); *see also United States v. Roman,* 822 F.2d 261, 265 (2d Cir.), *cert. denied,* 484 U.S. 954 (1987).

Defendant argues that the motion preparation time in this case is not excluded under § 3161(h)(1), because here, unlike other cases where motion preparation time has been excluded under § 3161(h)(1), the Magistrate Judge granted defendant additional time to prepare pretrial motions *sua sponte,* without a request by the defendant.[15] This

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[15] *Compare United States v. Hoslett,* 998 F.2d 648, 656-57 (9th Cir. 1993) (holding that a district court's standard practice of setting deadlines, *sua sponte,* for the filing of pretrial motions does not trigger the pretrial motion preparation exclusion under § 3161(h)(1); such exclusion is only triggered if

argument is based on a false statement of facts. Contrary to defendant's assertions, the Magistrate Judge did not grant pretrial motion preparation time *sua sponte;* rather, defense counsel, on behalf of the defendant, requested and was granted additional time to prepare and file his pretrial motions. At the arraignment on December 22, 1999, the Magistrate Judge stated, "So we need to set a scheduling order for motions. I assume there will be motions in this case." Government Exhibit No. 1 at 3. Defense counsel responded, "Yes, Your Honor." *Id.* Defense counsel then asked the Magistrate Judge for more time to review the government's voluntary discovery, *id.* at 4-5, and to prepare and file pretrial motions. *Id.* at 5-9. Defense counsel explained that the motions he was planning to file would be "substantive" motions attacking the indictment. *Id.* The Magistrate Judge granted defense counsel the additional time that he requested. *Id.* at 9.

Defendant further argues that because his motions were initially due to be filed on February 3, 2000, and because no motions were filed on his

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the defendant asks for additional time to prepare pretrial motions), *with Barnes,* 909 F.2d at 1064-65 (Seventh Circuit allowed court's *sua sponte* scheduling order to trigger pretrial motion preparation exclusion under § 3161(h)(1)) *and Montoya,* 827 F.2d at 153 (same).

behalf by that date, the Speedy Trial clock ran from that date until the government's detention motion was filed on February 11, 2000. Again, however, defendant's argument relies on a faulty statement of facts. As stated above, the transcript of the December 22nd arraignment and the December 28th Scheduling Order set forth that defendant's motions were due on February 23, 2000, not February 3, 2000.

In sum, the Court holds that motion preparation time is automatically excluded from the Speedy Trial clock under § 3161(h)(1). This holding is consistent with the majority of circuit courts that have decided the issue and with the Second Circuit Speedy Trial Guidelines. Accordingly, the Court finds that the period from January 12, 2000 to February 11, 2000 is excluded under § 3161(h)(1) from the 70-day Speedy Trial clock as motion preparation time.[16]

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[16] The fact that the Magistrate Judge cited § 3161(h)(1)(F) rather than § 3161(h)(1) in the December 28th Scheduling Order as the basis of the exclusion of the motion preparation time does not change this result. As stated above, § 3161(h)(1) is self-executing. Thus, there was no requirement for the Magistrate Judge to make any type of finding regarding the excludability of the motion preparation time. The exclusion is automatic.

Even if it were assumed *arguendo* that pretrial motion preparation time is not automatically excluded under § 3161(h)(1), defendant's conduct in contributing to the delay would preclude him from arguing that the time is not excluded. A defendant generally may not elect to waive the protections of the Speedy Trial Act, because Congress passed the Act not only for the benefit of criminal defendants, but also to further the public's interest in the prompt disposition of criminal cases.[17] *See United States v. Gambino,* 59 F.3d 353, 359-60 (2d Cir. 1995) (citations omitted), *cert. denied,* 517 U.S. 1187 (1996). Nonetheless, the Second Circuit and several other circuit courts have recognized an exception to the non-waiver rule, holding that when a defendant's conduct causes or contributes to a period of delay, that time may be excluded from the running of the Speedy Trial clock. *Id.* at 360-61; *see also United States v. Kucik,* 909 F.2d 206, 211 (7th Cir. 1990) ("Where a defendant actively participates in a continuance . . . he cannot then 'sand-bag' the court and the government by counting that time in a speedy trial motion"), *cert. denied,* 498 U.S. 1070 (1991); *United States v. Pringle,* 751 F.2d 419, 434-

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[17] The Speedy Trial Act does provide that a defendant waives his rights under the Act if he does not move for dismissal prior to trial. 18 U.S.C. § 3161(a)(2).

35 (1st Cir. 1984) (exception necessary to prevent defendants from "work[ing] both sides of the street, lulling the court and prosecution into a false sense of security only to turn around later and use the waiver-induced leisurely pace of the case as grounds for dismissal"); *see also, e.g., United States v. Fields*, 39 F.3d 439, 442-43 (3rd Cir. 1994) (approving *Kucik* rule in *dicta*); *United States v. Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989) (in *dicta* calling the *Pringle* exception a "sensible maxim").

> Where the public's interest in swift justice is not disregarded, such an exception makes good sense. The reason is plain. The provisions of the Speedy Trial Act are not to be mistaken for the rules of a game where defense counsel's cunning strategy may effectively subvert Congress' goal of implementing sound trial management.

Gambino, 59 F.3d at 360 (citations omitted). Thus, where a defendant or his counsel requests or affirmatively consents to a continuance for defendant's own advantage and the resulting delay does not subvert the ends of justice, the defendant may not later assert a Speedy Trial Act violation for the period of the continuance. *See id.* at 360-61; *Pringle*, 751 F.2d at 434 (defendant may not "simultaneously use the Act as a sword and a shield").

Here, as stated above, it was the defendant, through his counsel, who asked for and was granted a continuance to review the government's voluntary

discovery and to prepare pretrial motions. Considering the complexity and nature of this case, which involves 157 counts of fraud and false statements and voluminous dental and insurance records, it did not subvert the ends of justice to allow defendant such a continuance. Defendant cannot now turn around and use his own request for a continuance as a basis for dismissing the Indictment on speedy trial grounds.

0 NEW DAYS - 5 DAYS NON-EXCLUDED: 65 REMAIN

3. *Period of March 9, 2000 to May 10, 2000*

On or about March 3, 2000, Mark Mahoney, Esq., replaced Mr. Greenman as defendant's attorney, and appeared on behalf of the defendant at a hearing on the government's February 11, 2000 detention motion.[18] On March 9, 2000, Magistrate Judge Heckman granted the government's detention motion orally from the bench and ordered the defendant remanded pending trial. *See* Government

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[18] Although there is nothing on the docket sheet indicating why Mr. Mahoney replaced Mr. Greenman as defense counsel, it appears from a transcript of proceedings on March 9, 2000 that the substitution was necessary because Mr. Greenman had a conflict of interest. *See* Government Exhibit No. 4 at 24.

Exhibit No. 4. The Magistrate Judge also scheduled a conference for March 15, 2000, at which time the parties would discuss a new scheduling order. A written detention order was filed on March 14, 2000.

On March 15, 2000, a conference was held before Magistrate Judge Heckman. However, before scheduling matters were addressed, defense counsel argued for reconsideration of the Magistrate Judge's Detention Order.[19] The Magistrate Judge granted the motion for reconsideration and ordered new conditions of release for the defendant. Defense counsel, Mr. Mahoney, also asked for additional time to review the voluntary discovery provided by the government and to meet with previous defense counsel, Mr. Greenman, to determine the status of the preparation of pretrial motions. *See* Government Exhibit No. 5 at 30. The Magistrate Judge granted the request and directed that all voluntary discovery be completed by April 12, 2000, that defense motions

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[19] Although not part of the record, defense counsel apparently moved for reconsideration of the Detention Order by letter sometime before the March 15th conference. *See* Government Exhibit No. 5 at 2. Such a motion normally would have tolled the Speedy Trial clock under § 3161(h)(1)(F), but because the motion was not filed and made part of the record and there is no indication of the exact date the motion was made, the Court finds that the motion did not toll the clock in this case.

be filed by May 10, 2000, that the government's response be filed by May 31, 2000, and that oral argument on the motions be held on June 7, 2000. *Id.* at 32-33.

On March 20, 2000, Magistrate Judge Heckman filed a written scheduling order reflecting the dates discussed at the March 15, 2000 scheduling conference. *See* Government Exhibit No. 6. In the March 20th Scheduling Order, the Magistrate Judge also stated that the time period between March 15, 2000 and June 7, 2000 was excluded pursuant to § 3161(h)(1)(F) for the preparation and filing of motions. *Id.*

a. ***March 9, 2000 to March 15, 2000***

Defendant first contends that the period from March 9, 2000, the date on which the Magistrate Judge issued an oral decision revoking bail, to March 15, 2000, the date on which a new scheduling order was put in place, is not excluded time under the Speedy Trial Act. The Court agrees. There was no proceeding or motion pending during this five-day time period and the Court can discern no basis for

excluding the time under the Act.[20] Thus, five days expired from the Speedy Trial clock.

b. ***March 15, 2000 to March 20, 2000***

Defendant next argues that the period between March 15, 2000, the date the Magistrate Judge orally issued the new scheduling order, and March 20, 2000, the date the Magistrate Judge reduced the order to writing, is not excluded under the Speedy Trial Act. Although not clearly stated, defendant appears to be arguing that the March 15th oral scheduling order did not take effect until it was reduced to writing on March 20th. The Court finds this argument without merit. The March 15th oral

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[20] The government contends that sometime prior to March 9, 2000, defendant's previous attorney, Mr. Greenman, requested an extension of the time to prepare and file pretrial motions, and that because the request was not ruled on by the Magistrate Judge until March 15, 2000, the period between March 9th and March 15th is excluded under § 3161(h)(1)(F). Although the government did refer to such a request on the record during the proceedings on March 9th, *see* Government Exhibit No. 4 at 24-25, there is nothing in the record memorializing the actual request from Mr. Greenman (the request was apparently made in chambers). The Court will not go outside the record to support an exclusion of time under the Speedy Trial Act.

scheduling order took effect immediately; it did not have to be reduced to writing to become effective.

c. ***March 20, 2000 to May 10, 2000***

Defendant also argues that the time between March 20, 2000 and May 10, 2000 (the period for motion preparation under the March 20th Scheduling Order) is not excluded, because such time is not properly excluded under § 3161(h)(1). The Court finds this argument without merit, because, as stated above, contrary to defendant's argument, pretrial motion preparation time is automatically excluded under § 3161(h)(1).

Defendant further argues that even if the original motion preparation time granted by the Magistrate Judge in the December 28, 1999 Scheduling Order is assumed to be excluded under § 3161(h)(1), that time could be extended only under § 3161(h)(8) after an ends-of-justice finding by the Court, which did not occur here. Defendant fails, however, to cite any support or offer a cogent reason for drawing a distinction between the original scheduling order and the extension of that order, as it relates to the exclusion of motion preparation time under § 3161(h)(1). To the contrary, if delay resulting from pretrial motion preparation is automatically excluded under § 3161(h)(1), then it makes no difference whether such delay occurred as a result of an initial scheduling order or an extension of that order; In both instances the time is excluded under §

3161(h)(1). *See Mejia*, 82 F.3d at 1035-36 (holding that grant of defendant's request for extension of time to prepare and file pretrial motions, which extended until 15 days before trial, is properly excluded under § 3161(h)(1)); *Tibboel*, 753 F.2d at 610 (holding that entire delay resulting from the granting of defendant's successive requests for extensions to prepare and file pretrial motions is properly excluded under § 3161(h)(1)).

Moreover, even if motion preparation time or an extension of such time is not properly excluded under § 3161(h)(1), the Court finds that under the exception to the non-waiver rule, defendant is precluded from using such time to support a motion to dismiss under the Speedy Trial Act. The delay at issue here was the result of continuance granted by the Magistrate Judge at defendant's request. More specifically, defendant's new counsel requested the additional time to review discovery and file motions, which was reasonable considering that he had just become involved in the case about two weeks earlier. As stated above, this is a complex case with voluminous discovery materials. The granting of an extension under these facts and circumstances did not subvert the ends of justice.[21]

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[21] The Court also notes that on March 27, 2000, a further bail hearing was held at which, in response to defendant's

5 NEW DAYS - 10 DAYS NON-EXCLUDED: 60 REMAIN

4. *May 11, 2000 to June 28, 2000*

As stated, Magistrate Judge Heckman's March 20, 2000 Scheduling Order required defendant to file motions by May 10, 2000. *See* Government Exhibit No. 6. The Order further directed that, if no motions were filed by that date, the Speedy Trial Act exclusion would terminate as of that date. *Id.* Thus, if no further exclusion were in place, the Speedy Trial Act time would begin to run on May 11, 2000. Defendant did not file any motions by May 10th. However, on May 11th, when the Speedy Trial clock would otherwise have started to run, a status conference was held at which defendant's attorney, Mr. Mahoney, moved for additional time to file motions. *See* Government Exhibit No. 7. Mr. Mahoney explained that he needed the additional time because he was proceeding to trial in another case and because defendant's former attorney, Mr. Greenman, still had not provided him with all the

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motion, the Magistrate Judge modified defendant's terms and conditions of release. Similar hearings were also held on April 19 and 21, 2000. Thus, the dates March 27, April 19 and April 21, 2000 are all excluded under both § 3161(h)(1) as "proceedings concerning the defendant" and § 3161(h)(1)(F).

discovery materials. *Id.* Magistrate Judge Heckman granted the motion and directed defendant to file motions by June 28, 2000, the government to respond by July 19, 2000, and oral argument to be heard on July 26, 2000. *Id.* The Magistrate Judge also stated that the time would be excluded until the date of oral argument. *Id.* Defense counsel did not object. On May 12, 2000, Magistrate Judge Heckman filed a written scheduling order dated May 11, 2000, *see* Government Exhibit No. 7A, setting forth the agreed upon schedule and finding that the period between May 11, 2000 and July 26, 2000 is excluded from the Speedy Trial clock, pursuant to § 3161(h)(1)(F), for the preparation and filing of motions.[22] Again there was no objection from either the defendant or his counsel.

Defendant argues that the May 11, 2000 Scheduling Order was an "invalid 'retroactive'" exclusion of time. He also argues that the Order was invalid because motion preparation time is not properly excluded under § 3161(h)(1)(F). Thus, according to defendant, the time from May 11, 2000 to June 28, 2000 is not excluded. These arguments are without merit.

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[22] The Court notes that the docket sheet incorrectly states that the May 11th Scheduling Order was issued by Magistrate Judge Hugh B. Scott.

Defendant's "retroactivity" argument is difficult to understand. The May 11, 2000 Scheduling Order was clearly prospective, not retroactive. It excluded time out into the future, not the past. In any event, as stated above, motion preparation time is automatically excluded under § 3161(h)(1). Thus, no finding or order by the Magistrate Judge regarding the excludability of the time was even necessary. Moreover, because defendant requested the continuance, and the resulting delay did not subvert the ends of justice, defendant is precluded under the exception to the non-waiver rule from now asserting a Speedy Trial Act violation for the period of the continuance.

0 NEW DAYS - 10 DAYS NON-EXCLUDED: 60 REMAIN

5. ***Period of June 28, 2000 to July 31, 2000***

The May 11, 2000 Scheduling Order required the defendant to file motions by June 28, 2000. The Order further directed that, if no motions were filed by that date, the Speedy Trial Act exclusion would terminate as of that date. Thus, if no further exclusion were in place, the Speedy Trial Act time would have started to run on June 29, 2000. However, on June 28, 2000, defendant's attorney, Mr. Mahoney, moved by letter for an extension of time to file pretrial motions. *See* Government Exhibit No. 8. Defense counsel explained in his letter motion that additional time was needed because he

was still on trial in another case and had been unable to devote time to preparing the motions in this case. *Id.* On June 30, 2000, Magistrate Judge H. Kenneth Schroeder[23] granted defendant's request and directed that defendant file motions by July 31, 2000.[24] *Id.*

On July 18, 2000, Magistrate Judge Schroeder filed a new scheduling order confirming that defendant was to file pretrial motions by July 31, 2000 and also directing that the government respond to defendant's motions by August 14, 2000, and that oral argument be held on August 23, 2000. *See* Government Exhibit No. 9. The Magistrate Judge also stated in the Order that the time through August 23rd was to be excluded under § 3161(h)(1)(F). Neither defendant nor his counsel objected to the exclusion of time.

Defendant argues that, pursuant to the terms of the May 11, 2000 Scheduling Order, his failure to

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[23] Magistrate Judge Schroeder was assigned to this case on June 2, 2000 after Magistrate Judge Heckman resigned and returned to private practice. *See* Item No. 27.

[24] The time between June 28, 2000 (the date defendant made his motion for an extension of time) and June 30, 2000 (the date the Magistrate Judge decided the motion) is excluded under § 3161(h)(1)(F).

file motions by June 28, 2000 caused the Speedy Trial clock to start to run. This argument, however, ignores the fact that defendant's counsel requested and was granted an extension of time to prepare and file motions. As stated above, such an extension is automatically excluded under § 3161(h)(1). Further, because defendant requested the continuance and the resulting delay did not subvert the ends of justice, defendant is precluded under the exception to the non-waiver rule from now asserting a Speedy Trial Act violation for the period of the continuance. Thus, the period from June 28, 2000 to July 31, 2000 is properly excluded.

0 NEW DAYS - 10 DAYS NON-EXCLUDED: 60 REMAIN

6. *Period of November 18, 2000 to November 27, 2000*

On July 31, 2000, defendant filed pretrial motions to dismiss the indictment, to strike surplusage, for a bill of particulars, for pretrial discovery and to preclude certain evidence. On August 10, 2000, the government moved to strike defendant's memorandum of law or, in the alternative, for an extension of time to respond to defendant's motions. On August 30, 2000, Magistrate Judge Schroeder issued an Order, denying the government's motion to strike defendant's memorandum of law, and granting the government's motion for an extension of time to

respond. The government filed its response on September 20, 2000.

On October 18, 2000, the Magistrate Judge held a hearing on defendant's pretrial motions. Pursuant to 18 U.S.C. § 3161(h)(1)(J), the Magistrate Judge had 30 days, or until November 17, 2000, to take the motions under advisement and render a decision. The Magistrate Judge, however, did not render a decision by November 17th. Thus, the Speedy Trial clock began to run on November 18, 2000.

On November 27, 2000, the Magistrate Judge issued an order, *see* Government Exhibit No. 10, granting a 30-day continuance for further consideration of the motions, and excluding the time until December 18, 2000, pursuant to § 3161(h)(8)(A). Defendant does not contest the appropriateness of the November 27th Order.

Defendant contends that the nine-day period between November 18 and November 27, 2000, is not excluded time. The Court agrees. Accordingly, nine new days of speedy trial time elapsed.

9 NEW DAYS - 19 DAYS NON-EXCLUDED: 51 REMAIN

7. December 19, 2000

As set forth above, on November 27, 2000, the Magistrate Judge issued an Order granting another 30-day period to consider defendant's motions. That 30-day period expired on December 18, 2000.

However, the Magistrate Judge did not file his Report and Recommendation on the motions until December 20, 2000. Thus, defendant correctly argues that the one-day delay, December 19, 2000, is not excluded time.

1 NEW DAY - 20 DAYS NON-EXCLUDED: 50 REMAIN

8. *Period of December 20, 2000 to February 5, 2001*

As stated above, on December 20, 2000, the Magistrate Judge issued his Report and Recommendation, in which he recommended that defendant's various requests for relief be denied. *See* Item No. 41. The Magistrate Judge also advised defendant that he had ten days from the receipt of the Report and Recommendation to file objections with this Court. *Id.*

On January 11, 2001, defendant's attorney, Mr. Mahoney, filed an affidavit in support of a motion seeking an extension of the time to file objections to the Report and Recommendation. *See* Item No. 42. In his affidavit, Mr. Mahoney acknowledged receiving the Report and Recommendation on December 27, 2000. Thus, the original ten-day period to file objections, excluding holidays and weekends, would have expired on January 11, 2001, the date Mr. Mahoney filed his motion for an extension. *See* Fed. R. Crim. P. 45. On January 12, 2001, this Court

granted an extension until February 8, 2001. *See* Government Exhibit No. 11.

On February 5, 2001, the government again moved to revoke defendant's bail and for defendant to be detained pending trial.

Defendant claims that the ten-day period to file objections to the Magistrate Judge's Report and Recommendation is not properly excluded under the Speedy Trial Act. This claim has no merit.

Although the Second Circuit has not yet addressed this issue, other circuit courts have held that the ten-day period for parties to file objections to a magistrate judge's report and recommendation is excluded under the Speedy Trial Act. *See, e.g., United States v. Jenkins,* 92 F.3d 430, 439 (6th Cir. 1996), *cert. denied,* 520 U.S. 1170 (1997); *United States v. Long,* 900 F.2d 1270, 1275 (8th Cir. 1990). In *Long,* the Eighth Circuit held that:

> The issuance of the report and recommendation began a new excludable period under section 3161(h)(1)(F). The magistrate is required to file the report and recommendation with the district court, and the parties must file their objections to it within 10 days. The district court is required to rule on any objections. The filing of the report and recommendation, therefore, in essence serves to re-file the motions, together with the magistrate's study of them, with the district court. Under section 3161(h)(1)(F), this filing tolls the 70-day count until the district

> court holds a hearing or has all the submissions it needs to rule on the motions.

Long, 900 F.2d at 1275 (citation and footnote excluded).

Based on these cases, the Court finds that the ten-day period for filing objections to the Magistrate Judge's Report and Recommendation is automatically excluded under § 3161(h)(1)(F).

Defendant also argues that the time between January 12, 2001 (the date the Court granted defendant's motion for an extension of time to file objections to the Report and Recommendation) and February 5, 2001 (the date the government filed its new motion to revoke bail) is not properly excluded time. According to defendant, such time could only be properly excluded under § 3161(h)(8) after an ends-of-justice finding by the Court, which did not occur here. This argument is without merit. As stated above, the filing of the Report and Recommendation, in essence, serves to re-file the motions, together with the Magistrate Judge's study of them, with this Court. Under § 3161(h)(1)(F), this filing tolls the Speedy Trial clock until this Court holds a hearing or has all the submissions it needs to rule on the motions. Thus, the time between January 12, 2001 and February 5, 2001 is excluded under § 3161(h)(1)(F).

0 NEW DAYS - 20 DAYS NON-EXCLUDED: 50 REMAIN

9. *Period of September 29, 2001 to October 16, 2001*

As stated above, on February 5, 2001, the government filed a motion to revoke defendant's bail. This motion resulted in lengthy hearings and substantial submissions by the parties. The last submission regarding this motion was filed on August 28, 2001 and Magistrate Judge Schroeder deemed the matter submitted for decision as of that date. All the time between February 5, 2001 and August 28, 2001 is properly excluded under § 3161(h)(1)(F).[25]

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[25] In his supplemental reply memorandum filed on August 14, 2003, defendant alleges, for the first time, that the government's bail revocation motion was based on false affidavits and that the sole purpose of the bail revocation motion was to cause the trial to be delayed (although he does not allege that the delay caused by the revocation motion should be counted against the Speedy Trial clock). Defendant fails, however, to present any evidence that the government was trying to delay the trial in this case. To the contrary, the record shows that the government has consistently tried to bring this case to trial. In fact, on June 8, 2001, during the pendency of the bail revocation motion, the government filed a motion with this Court seeking a trial date. On June 11, 2001, defendant filed a memorandum opposing the government's motion. On June 12, 2001, in light of the defendant's opposition, the Court denied the government's request to schedule a trial date.

Pursuant to § 3161(h)(1)(J), the Magistrate Judge had 30 days of excluded time to consider the government's bail revocation motion and render a decision. The 30-day period expired September 28, 2001, but the Magistrate Judge did not issue a decision until October 12, 2001. The parties then appeared before the Magistrate Judge on October 16, 2001, at which time defendant's counsel, Mr. Mahoney, made an *ex parte* application to withdraw from the case.

Without any other exclusion, the period between September 29, 2001 and October 16, 2001 would not be excluded time under the Speedy Trial Act. However, previously, on May 22, 2001, the government filed a motion seeking discovery from the defendant and an order of preclusion of any evidence defendant improperly failed to turn over to the government. Defendant never filed a response to this motion. On October 16, 2001, the Magistrate Judge began to hear argument on the government's motion, but after a brief discussion, the proceeding shifted to Mr. Mahoney's application to withdraw and the government's discovery motion was held in abeyance.[26] *See* Government Exhibit No. 12. The

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[26] Defendant points out that the docket entry for October 16, 2001 reflects that a hearing was held on the government's discovery motion on that date. The transcript of the October 16th proceeding, however, reflects that the hearing was not

government renewed its motion for discovery on June 25, 2002, in response to new pretrial motions filed by the defendant.[27] *See* Item No. 148. The government's discovery motion remained pending until July 16, 2002, when this Court heard the motion and resolved it by directing the defendant to provide all discovery to the government by September 6, 2002.[28]

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completed because Mr. Mahoney pressed his request to withdraw as counsel instead.

[27] During the period October 16, 2001 to June 25, 2002, the government's discovery motion was held in abeyance pending resolution of the issue of defendant's legal representation and to allow new counsel time to develop a defense. More specifically, during that time, the Magistrate Judge granted Mr. Mahoney's motion to withdraw as defense counsel, defendant appealed the Magistrate Judge's decision to this Court, this Court affirmed the Magistrate Judge, defendant appealed that determination to the Second Circuit Court of Appeals, the Second Circuit dismissed the appeal, this Court assigned new counsel to represent defendant and gave new counsel two months to prepare a defense, the government moved again to revoke defendant's bail, *see* Item No. 129, new counsel filed additional pretrial motions, *see* Item No. 146, and the government renewed its motion for discovery in response to those motions.

[28] In reviewing the record in this case, the Court discovered that the minute entry for the July 16, 2002 proceeding was inadvertently omitted from the docket sheet. The Court has

Although not clearly stated, defendant appears to argue that the government's discovery motion was pending for an unreasonably long period of time and that his failure to respond to the motion automatically resulted in the motion being deemed submitted for decision, thereby starting the 30-day advisement period under § 3161(h)(1)(J). The Court finds this argument without merit.

Although the government's discovery motion was pending for a lengthy period of time (May 22, 2001 to July 16, 2002), the entire period between the filing of the motion and the conclusion of the hearing on the motion is excluded under § 3161(h)(1)(F). In *Henderson,* 476 U.S. at 326-27, the Supreme Court rejected a defendant's argument that an exclusion under § 3161(h)(1)(F) only encompasses "reasonable" delays in hearing the motion. The Court held that "[t]he plain terms of the statute appear to exclude all time between the filing of and the hearing on the motion whether that hearing was prompt or not." *Id.* at 326. Thus, under § 3161(h)(1)(F) and *Henderson,* the government's motion for discovery tolled the Speedy Trial clock from May 22, 2001, the day the

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reviewed the minutes of the proceeding and shall order the Clerk of Court to enter them on the docket sheet.

motion was filed, until July 16, 2002, the day the hearing on the motion was held.[29]

Defendant could have responded or conceded to the government's motion for discovery at an earlier date, but failed to do so. A defendant may not claim a Speedy Trial Act violation caused by his own failure to respond to a government motion. *See Bufalino,* 683 F.2d at 646 ("It seems to us that [the defendant], when faced with a government motion, had a duty to do more than stand by without taking a position and then reap the benefit of inaction by having the indictment dismissed on speedy trial grounds.").

In sum, the Court finds that the entire period from May 22, 2001 through July 16, 2002, including the period between September 29, 2001 and October 16, 2001, is properly excluded under § 3161(h)(1)(F).

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[29] The fact that the motion was filed by the government as opposed to the defendant is of no consequence. The Speedy Trial Act exclusion under § 3161(h)(1)(F) applies to motions filed by the government as well as motions filed by the defendant. *See United States v. Beck,* 729 F.2d 1329, 1331 (11th Cir.), *cert. denied,* 469 U.S. 981, 105 (1984); *United States v. Johnpoll,* 739 F.2d 702, 713 (2d Cir.), *cert. denied,* 469 U.S. 1075 (1984); *Bufalino,* 683 F.2d at 646; *United States v. Mikulec,* 1989 WL 56240 at *3 n. 10 (W.D.N.Y. May 22, 1989), *aff'd,* 927 F.2d 593 (2d Cir. 1991).

0 NEW DAYS - 20 DAYS NON-EXCLUDED: 50 REMAIN

10. *Period of October 24, 2001 to November 1, 2001*

On October 24, 2001, Magistrate Judge Schroeder issued an order granting Mr. Mahoney's motion to withdraw as counsel and directing the parties to appear on November 1, 2001, for a status conference for purposes of addressing the issue of defendant's legal representation. *See* Item No. 108. On November 1, 2001, defendant filed with this Court a notice of appeal of the Magistrate Judge's decision relieving Mr. Mahoney. On December 6, 2001, the parties appeared before this Court for a status conference. At that time, the Court appointed the Federal Public Defender's Office (the "Public Defender") to represent defendant solely for the purpose of the appeal of the Magistrate Judge's decision relieving Mr. Mahoney.

Defendant claims that the period between the Magistrate Judge's October 24, 2001 Order relieving Mr. Mahoney and the filing of his notice of appeal on November 1, 2001, is not excluded time under the Speedy Trial Act. The Court finds this claim unavailing for two reasons.

First, as discussed above, the period October 24, 2001 to November 1, 2001 was excluded under § 3161(h)(1)(F) because the government's discovery motion was pending. Second, the Second Circuit has

held that the entire period between the time a motion for substitution or withdrawal of counsel is made and granted, and the time that new counsel is actually substituted is properly excluded under § 3161(h)(1)(F). *See United States v. Hammad*, 902 F.2d 1062, 1064 (2d Cir.) (holding that defense counsel's motion to withdraw was disposed of when new counsel was substituted and therefore exclusion of the entire time was appropriate under § 3161(h)(1)(F)), *cert. denied*, 498 U.S. 871 (1990). Here, because defendant appealed the Magistrate Judge's Order relieving Mr. Mahoney, the substitution of new counsel to represent defendant was delayed until disposition of the appeal (the Public Defender was only assigned to represent defendant on the appeal itself). Thus, under *Hammad*, the motion to withdraw was still pending as of November 1, 2001, because new counsel had not yet been substituted. Accordingly, the time from October 24, 2001 to November 1, 2001 is properly excluded.

0 NEW DAYS - 20 DAYS NON-EXCLUDED: 50 REMAIN

11. *Period of February 13, 2002 to February 20, 2002*

On January 25, 2002, this Court heard, *ex parte*, defendant's argument concerning his appeal of the Magistrate Judge's October 24, 2001 Order relieving Mr. Mahoney. On February 13, 2002, the Court

issued an Order affirming the Magistrate Judge.[30] *See* Item No. 122. In that same Order, the Court also appointed the Public Defender as defendant's counsel for the remainder of the case and directed the parties to appear on February 20, 2002, for a status conference. *Id.*

At the February 20th status conference, the Public Defender requested a two-month adjournment to review the file and prepare a defense. The Court granted the requested adjournment, scheduled a further status conference for April 22, 2002, and issued an order excluding the time from February 20, 2002 to April 22, 2002, pursuant to § 3161(h)(8)(A). Defendant does not dispute this exclusion.

On February 25, 2002, defendant filed with the Second Circuit Court of Appeals a notice of appeal of this Court's February 13, 2002 Order affirming the Magistrate Judge's decision relieving Mr. Mahoney. On March 29, 2002, the Second Circuit dismissed

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[30] Defendant does not dispute that the time between November 1, 2001 (the date of the filing of his notice of appeal of the Magistrate's Judge's October 24, 2001 decision relieving Mr. Mahoney) and February 13, 2002 (the date of this Court's decision affirming the Magistrate Judge's decision) is properly excluded.

defendant's appeal *sua sponte* for lack of appellate jurisdiction.

Defendant argues that the time between the Court's February 13th Order and the February 20th status conference is not properly excluded time. Again, defendant's argument is without merit.

First, as discussed above, the period of time at issue was excluded under § 3161(h)(1)(F) because the government's discovery motion was pending. Second, as also discussed above, the entire period between the time a motion for substitution or withdrawal of counsel is made and granted, and the time that new counsel is actually substituted is excluded under § 3161(h)(1)(F). Here, although the Court, in its February 13th Order, assigned the Public Defender to represent defendant for the remainder of the case, the Public Defender did not appear in that role until the February 20th status conference. Thus, the period between February 13th and February 20th is excluded. *See United States v. Mohr*, 26 Fed. Appx. 604, 605, 2001 WL 1346009 (9th Cir. 2001) (two days during which defendant's motion for appointment of new counsel was pending and following five days before new counsel made his appearance were excluded under § 3161(h)(1)(F)). Third, because defendant subsequently appealed the Court's February 13th Order affirming Mr. Mahoney's withdrawal, the motion to withdraw was not finally disposed of until the Second Circuit dismissed defendant's appeal on March 29, 2002. Accordingly, the time between the Court's February 13th Order

and the February 20th status conference is properly excluded.

0 NEW DAYS - 20 DAYS NON-EXCLUDED: 50 REMAIN

12. *Period of February 7, 2003 to February 20, 2003*

On November 20, 2002, the Public Defender moved to withdraw as defendant's counsel based on a possible conflict of interest.[31] On November 27, 2002, the Court denied the motion from the bench. That same day, November 27th, defendant filed a notice of appeal with the Second Circuit Court of Appeals regarding the Court's denial of the motion.

On December 20, 2002, the Second Circuit granted defendant's request for a stay of this Court's proceedings (the trial was scheduled to commence on January 7, 2003)[32], pending resolution of defendant's appeal. On February 5, 2003, the Second Circuit

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[31] Defendant does not dispute that the time between February 20, 2002 and November 20, 2002 is properly excluded time under the Speedy Trial Act.

[32] Trial had been previously scheduled for October 1, 2002, but was adjourned pursuant to a request by the defendant. *See* Item No. 155.

issued an Order, vacating this Court's denial of the Public Defender's motion to be relieved as counsel and directing the Court to grant the motion and appoint new counsel for defendant. The Second Circuit's Order also stated that an opinion would follow. At a status conference on February 20, 2003, the Court appointed John Molloy, Esq., to represent the defendant. On June 3, 2003, the Second Circuit issued its opinion, *United States v. Oberoi*, 331 F.3d 44 (2d Cir. 2003). After setting forth its reasoning for allowing the Public Defender to withdraw, the Second Circuit vacated its stay of the proceedings in this Court.

Defendant argues that the period between his receipt of the Second Circuit's Order relieving the Public Defender (February 7, 2003) and the status conference held on February 20, 2003, where Mr. Molloy first appeared as defendant's counsel, is not properly excluded time for Speedy Trial Act purposes. This argument is without merit.

First, the period is excluded under 18 U.S.C. § 3161(h)(1)(E), as a delay resulting from an interlocutory appeal. The Second Circuit stayed all proceedings in this Court on December 20, 2002 and did not vacate that stay until June 3, 2003. Second, as discussed above, the entire period between the time a motion for substitution or withdrawal of counsel is made and granted, and the time that new counsel is actually substituted is excluded under § 3161(h)(1)(F). Here, Mr. Molloy was not substituted as counsel until February 20, 2003. Thus, the period

between February 7, 2003 and February 20, 2003 is properly excluded.

0 NEW DAYS - 20 DAYS NON-EXCLUDED: 50 REMAIN[33]

C. ***Pre-Indictment Delay***

Defendant also contends that the Indictment in this case must be dismissed because it was not filed within 30 days of his arrest as required by the Speedy Trial Act. The Court finds this contention without merit.

The Speedy Trial Act requires that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within 30 days from the date on which such individual was arrested or served with a summons in

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[33] The Court notes that the Speedy Trial Order entered on June 19, 2003, indicates that there are 54 days remaining under the Speedy Trial Act. This Order was prepared by the government. The Court notes that there is a discrepancy between the June 19th Order (54 day remaining), the calculations provided by the government in opposition to defendant's motion to dismiss (55 days remaining), and the Court's calculations herein (50 days remaining). Nevertheless, the Court need not resolve this discrepancy at this point. If the discrepancy becomes pertinent in the future, the Court will address it then.

connection with such charges." 18 U.S.C. § 3161(b). If the government fails to comply with this time limit, the Act requires the dismissal of charges in the complaint, with or without prejudice. 18 U.S.C. § 3162(a)(1) ("If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.").

As stated above, on October 14, 1999, a criminal complaint was filed against the defendant charging him with violations of 18 U.S.C. § 1341 (mail fraud) and § 1347 (health care fraud). Defendant was arrested and first appeared in this Court on October 18, 1999. At that time, a preliminary hearing was scheduled for November 3, 1999, which was later rescheduled for November 5, 1999.

On November 5th, the parties reported that they were engaged in pre-indictment discovery and jointly requested a 30-day adjournment of the preliminary hearing, which Magistrate Judge Heckman granted. *See* Item No. 304. The preliminary hearing was rescheduled for December 1, 1999.

On December 1st, the parties again appeared for the scheduled preliminary hearing. At that time, however, the government handed up an affidavit stating that the government had informed defendant's attorney that it was prepared to ask the

grand jury to return an indictment prior to December 1, 1999, but that defense counsel requested that the government refrain from seeking an indictment to allow more time for pre-indictment discovery and plea negotiations. *See* Item Nos. 3 and 305. The parties jointly requested a two-week adjournment of the preliminary hearing. The affidavit noted that such an adjournment would be in the best interests of both the defendant and the public, because it would give the defendant time to ass s the government's case and consider his options and because a pre-indictment plea resolution would save the public the costs associated with post-indictment proceedings and a trial. Magistrate Judge Heckman granted the adjournment and excluded the time "in the interest of justice." Defendant's attorney expressly stated that he did not object to the exclusion of time. The preliminary hearing was rescheduled for December 15, 1999.

On December 16, 1999, 58 days after defendant was initially arrested, the grand jury returned an Indictment charging him with violations of 18 U.S.C. § 1341 (mail fraud) and § 1035(a)(2) (making false statements in connection with health care benefits).

Defendant argues that, because the Indictment was not filed within 30 days of his arrest, the government violated § 3161(b) and the Indictment must be dismissed pursuant to § 3162(a)(1). Defendant's argument ignores the fact, however, that it was he, through his counsel, who twice requested that the filing of the indictment be

delayed so that he could conduct pre-indictment discovery and discuss with the government a possible plea disposition. Because defendant requested the continuances, and the resulting delay did not subvert the ends of justice, defendant is precluded under the exception to the non-waiver rule from now asserting a Speedy Trial Act violation for the period of the continuances. See *Gambino*, 59 F.3d at 360-61; *Pringle*, 751 F.2d at 434.

CONCLUSION

For the reasons stated, the Court finds that there are 20 days of non-excluded time under the Speedy Trial Act, with 50 days of time remaining. The Court further finds that there was no violation of the Speedy Trial Act based on pre-indictment delay. Thus, the Court denies defendant's motion to dismiss the Indictment under the Speedy Trial Act. The Court hereby orders the Clerk of Court to enter the minutes of the proceedings held on July 16, 2002 on the docket sheet. Jury selection shall be held on January 6, 2004 at 9:30 a.m. Trial shall commence on January 21, 2004 at 10:00 a.m. Finally, the Court orders the Clerk of Court not to accept for filing any motion for reconsideration of this Decision and Order. Defendant's time would be better spent preparing for trial rather than preparing motions for reconsideration.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14th day of January, two thousand and nine,

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United States of America,
Appellee,
v.
Tejbir S. Oberoi,
Defendant-Appellant.

ORDER
Docket No.
04-4545-cr

Tejbir S. Oberoi having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolf, Clerk

By: /s/,
Frank Perez, Deputy Clerk

18 U.S.C. § 3161 (current version)

(Effective Oct. 13, 2008 - present)

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)

(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date

the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)

(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The

periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)

(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be

obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance

granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing

of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of

the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)

(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly

advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)

(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of

subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

18 U.S.C. § 3161 (prior version)

(Effective Dec. 1, 1990 - Oct. 13, 2008)

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)

> **(1)** In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date

the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)

(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The

periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to

and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)

(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his

whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such

proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the

attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)

(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the

prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)

(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

18 U.S.C. § 3162

§ 3162. Sanctions

(a)

(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h) (3). In determining whether to dismiss

the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
MAY 15 2009
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No. 08-1264

In the Supreme Court of the United States

TEJBIR S. OBEROI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether time granted at the request of a defendant to prepare pretrial motions qualifies as "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1), and is thus excludable from the time within which trial must commence under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

2. Whether the time between the date on which a magistrate judge files a report and recommendation on pretrial motions and the date on which the parties must file objections to the report and recommendation is excludable under Section 3161(h).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 547 F.3d 436. The decision and order of the district court denying petitioner's motion to dismiss the indictment under the Speedy Trial Act (Pet. App. 51a-102a) is reported at 295 F. Supp. 2d 286.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2008. A petition for rehearing was denied on January 14, 2009 (Pet. App. 103a-104a). The petition for a writ of certiorari was filed on April 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of New York, petitioner was convicted of making false statements in connection with health care benefits, in violation of 18 U.S.C. 1035, and mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. Pet. App. 8a. The court of appeals affirmed. *Id.* at 1a-50a.

1. The Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to commence within 70 days of his indictment or his first appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the computation of the 70-day period are periods of delay "resulting from other proceedings concerning the defendant, including but not limited to * * * delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F).[1] Also automatically excluded from the 70-day period is "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. 3161(h)(1)(J). Addi-

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[1] On October 13, 2008, Congress enacted the Judicial Administration and Technical Amendments Act of 2008 (2008 Act), Pub. L. No. 110-406, 122 Stat. 4291, which makes certain technical changes to the STA. Among other things, the 2008 Act redesignates 18 U.S.C. 3161(h)(1)(F) as 18 U.S.C. 3161(h)(1)(D); 18 U.S.C. 3161(h)(1)(J) as 18 U.S.C. 3161(h)(1)(H); and 18 U.S.C. 3161(h)(8) as 18 U.S.C. 3161(h)(7). § 13, 122 Stat. 4294. All citations to the STA in this brief refer to the pre-2008 Act version of the statute, as codified in the 2006 edition of the United States Code.

tionally, a district court may exclude from the 70-day limit "[a]ny period of delay resulting from a continuance * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A). Such findings must be made at or before the time the Court rules on a motion to dismiss for an STA violation. *Zedner* v. *United States*, 547 U.S. 489, 507 (2006). If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. Petitioner, a dentist in Buffalo, New York, defrauded insurance companies and dental benefit plans by filing reimbursement claims for procedures that he did not perform. Pet. App. 3a. In addition, to make his excessive billings appear legitimate, petitioner conducted unnecessary and invasive procedures, including root canals and osseous surgery, on unsuspecting healthy patients. Gov't C.A. Br. 1-2.

3. On October 14, 1999, a criminal complaint was filed charging petitioner with mail fraud, in violation of 18 U.S.C. 1341, and health care fraud, in violation of 18 U.S.C. 1347. Pet. App. 3a. On December 16, 1999, a grand jury indicted petitioner on 34 counts of mail fraud and 123 counts of making false statements in connection with health care benefits, in violation of 18 U.S.C. 1035. Pet. App. 3a-4a. On December 22, 1999, petitioner was arraigned. That day was also his first appearance before a judicial officer, which began the running of the

speedy trial clock. See *id.* at 38a; 18 U.S.C. 3161(c)(1). Thereafter commenced "unusually event-filled pretrial proceedings, including three interlocutory appeals, hearings concerning bail (26 days), competency proceedings, and several switches of defense counsel before [petitioner] elected to represent himself." Pet. App. 2a.

On June 20, 2003, petitioner, proceeding pro se, moved to dismiss the indictment because of an alleged violation of the STA. Pet. App. 52a. The district court denied the motion. *Id.* at 51a-102a.

The following time periods are relevant to petitioner's STA claim: On December 22, 1999, in response to a request by petitioner's counsel for "additional time to prepare and file his pretrial motions," Pet. App. 69a, a magistrate judge set a schedule for the filing of pretrial motions, with oral argument to be held on March 3, 2000, *id.* at 38a. The magistrate judge stated that the time until that date would not count towards the STA deadline, but the court did not further explain the exclusion of time. *Ibid.* On December 28, 1999, the magistrate judge entered a written order directing the parties to file pretrial motions by February 23, 2000, and scheduling oral argument for March 10, 2000. *Ibid.* Citing the Second Circuit's Speedy Trial Guidelines, as well as cases from the First and Seventh Circuits holding that pretrial motion preparation time is automatically excluded from the speedy trial clock, the magistrate judge ordered that "the period of time from the date of this order until the date of oral argument is excluded under 18 U.S.C. § 3161(h)(1)(F)." Pet. App. 39a (citation omitted).

On March 20, 2000, the magistrate judge entered a similar written order directing the parties to file pretrial motions by May 10, 2000, and expressly stopping the

speedy trial clock on that basis. Pet. App. 40a. No motions were filed by the May 10 deadline, but, at a conference on the following day, the magistrate judge orally granted petitioner's motion for a further extension of time to prepare motions. *Id.* at 41a. On May 12, 2000, the magistrate judge entered a third written scheduling order directing the parties to file pretrial motions by June 28, 2000, and setting oral argument for July 26, 2000. *Ibid.* The written order again excluded time pursuant to 18 U.S.C. 3161(h)(1)(F). Pet. App. 41a.

On June 28, 2000, petitioner's counsel by letter requested another extension of time to file pretrial motions. Pet. App. 41a. On June 30, 2000, a magistrate judge granted the request without referring to the STA. *Ibid.* On July 18, 2000, the magistrate judge issued a written order directing the parties to file pretrial motions by July 31, 2000, and scheduling oral argument for August 23, 2000. *Id.* at 41a-42a. Pursuant to 18 U.S.C. 3161(h)(1)(F), the order excluded from the STA deadline the time from the date of the order through the date for oral argument. Pet. App. 42a.

On July 31, 2000, petitioner filed pretrial motions. Pet. App. 42a. The magistrate judge held a hearing on those motions on October 18, 2000. *Ibid.* On November 27, 2000, the magistrate judge issued a written order excluding from the STA deadline the next 30 days (until December 18, 2000), pursuant to 18 U.S.C. 3161(h)(8)(A), and making the necessary finding that the delay furthered the ends of justice. Pet. App. 42a-43a.

On December 20, 2000, the magistrate judge issued his report and recommendation on the pretrial motions. Pet. App. 43a. Petitioner's counsel received the report and recommendation on December 27, 2000, which automatically triggered a 10-day period for filing objections

with the district court, pursuant to 28 U.S.C. 636(b)(1). Pet. App. 43a. The 10-day objections period, which excludes holidays and weekends, see Fed. R. Crim. P. 45(a)(2), expired on January 11, 2001. Pet. App. 43a. On that day, petitioner's counsel requested an extension of time within which to file objections. On January 12, 2001, the district court entered an order giving petitioner until February 8, 2001, to file objections. *Ibid.* Thereafter, the "filing of objections was overtaken by other procedural events," which independently tolled the speedy trial clock beginning on February 5, 2001. *Id.* at 44a.

In denying petitioner's motion to dismiss the indictment under the STA, the district court found that only 20 days of the 70-day statutory limit had elapsed. Pet. App. 102a. As relevant here, the district court concluded that the time necessary to prepare pretrial motions is "automatically excluded from the Speedy Trial clock under § 3161(h)(1)," *id.* at 70a, which excludes any period of delay resulting from "other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1). In addition, the district court held that the time for filing objections to a magistrate judge's report and recommendation on pretrial motions is also automatically excluded from the speedy trial clock. Pet. App. 86a. Relying on cases from the Sixth and Eighth Circuits, the court reasoned that the filing of the report and recommendation "in essence serves to re-file the motions, together with the magistrate's study of them, with the district court," and therefore "this filing tolls the 70-day count until the district court holds a hearing or has all the submissions it needs to rule on the motions." *Id.* at 86a-87a (quoting *United States* v. *Long*, 900 F.2d 1270, 1275 (8th Cir. 1990)).

Jury selection in petitioner's trial began on January 12, 2004. Pet. App. 7a. On January 15, 2004, pursuant to an agreement with the government, petitioner pleaded guilty to one count of making false statements in connection with a health care matter, in violation of 18 U.S.C. 1035, and one count of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 7a-8a. Petitioner reserved the right to appeal his STA claim. *Id.* at 7a. He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-50a. As relevant here, the court held that the district court correctly denied petitioner's motion to dismiss the indictment for violation of the STA because fewer than 70 non-excludable days elapsed between petitioner's arraignment on December 22, 1999, and the start of petitioner's trial on January 12, 2004. *Id.* at 8a-46a.

First, the court of appeals rejected petitioner's argument that time requested by a defendant to prepare pretrial motions may not be automatically excluded from the 70-day limit under 18 U.S.C. 3161(h)(1). Pet. App. 20a-28a. The court noted that the courts of appeals disagree on whether motion preparation time is excludable under Section 3161(h)(1)'s general language tolling the speedy trial clock for "other proceedings concerning the defendant, including but not limited to" the proceedings specified in Subsections (h)(1)(A) through (J). *Id.* at 23a-27a. After analyzing the issue, the court "join[ed] the sound majority of circuits holding that the time needed for the preparation of pretrial motions can be excluded under § 3161(h)(1)." *Id.* at 27a.

The court reasoned that, although motion preparation time does not fall within Subsection (h)(1)(F)'s spe-

cific exclusion for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," 18 U.S.C. 3161(h)(1)(F), that provision is "but an illustration of the general language of § 3161(h)(1)." Pet. App. 25a (quoting *United States* v. *Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982) (Breyer, J.)). The court observed that "section 3161(h)(1) is explicit that the particular intervals in subsections A through J are illustrative rather than exhaustive" because Section 3161(h)(1) uses the phrase "including but not limited to." *Ibid.* (quoting *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985)). The court further reasoned that "subsection (h)(1)(F) automatically stops the clock for preparation of response papers" to pretrial motions and "[t]he same interests and considerations that militate in favor of allocating time for a party to respond to a motion (and for a court to decide it) justify the allocation of time to prepare the motion in the first place." *Id.* at 27a. The court, however, added a "caveat" to its holding: in order for pretrial motion preparation time to qualify for automatic tolling under Section 3161(h)(1), "the lower court must expressly stop the speedy trial clock, either on the record or in a written order." *Ibid.* The court reasoned that "[t]his condition is critical" to allow "the creation of a docket entry," which "facilitate[s] audits for compliance with the [STA] (in the trial court and on appeal)." *Id.* at 27a-28a.

Second, the court of appeals held that the time from a magistrate judge's issuance of a report and recommendation on pretrial motions through the deadline for filing objections to the report and recommendation is also excluded from the speedy trial clock under Section 3161(h)(1). Pet. App. 29a-34a. Like the district court,

the court of appeals agreed with cases from the Sixth and Eighth Circuits reasoning that the filing of the report and recommendation effectively "serves to re-file the motions" with the district court, thereby tolling the speedy trial clock "until the district court holds a hearing or has all the submissions it needs to rule on the motions." *Id.* at 31a-32a (quoting *Long*, 900 F.2d at 1275, and citing *United States* v. *Andress*, 943 F.2d 622, 626 (6th Cir. 1991), cert. denied, 502 U.S. 1103 (1992)).

The court of appeals noted that the Seventh and Eleventh Circuits "take a slightly different tack." Pet. App. 32a. In those circuits, the court explained, "the issuance of a report and recommendation starts the clock; but the filing of objection automatically stops it." *Ibid.* (citing *United States* v. *Thomas*, 788 F.2d 1250, 1257 (7th Cir.), cert. denied, 479 U.S. 853 (1986), and *United States* v. *Robinson*, 767 F.2d 765, 769 (11th Cir. 1985)). The court rejected that approach, reasoning that "[w]hile [it] speeds things along, it seems to assume that a report and recommendation is a final disposition of a motion, rather than a document that 'is automatically filed with the district court, which in turn is required to make a *de novo* determination on the issues to which a party objects.'" *Id.* at 33a (quoting *Long*, 900 F.2d at 1275 n.3). The court of appeals further observed that, "[e]ven if neither party files an objection to the report and recommendation, the motion itself is decided only after the district court rules." *Ibid.* Based on those considerations, the court of appeals ruled that "[t]he issuance of a report and recommendation automatically tolls the speedy trial clock under subsection (h)(1)(F) until ten days pass or objections are filed (whichever comes sooner)." *Id.* at 34a.

Applying these principles, the court of appeals excluded 154 days as time for the preparation of pretrial motions. See Pet. App. 38a-39a, 40a, 41a-42a. The court declined to exclude an additional 24 days based on its "caveat" that time granted to prepare pretrial motions is excluded only if the district court expressly stops the speedy trial clock for that purpose. See *id.* at 38a (refusing to exclude five days—December 23, 1999, through December 27, 1999); *id.* at 41a (refusing to exclude 19 days—May 11, 2000, and June 30, 2000, through July 17, 2000). The court also excluded 44 days based on its ruling that the time between the issuance of a magistrate's report and recommendation on the pretrial motions and the filing of any objections is also excluded. See *id.* at 43a-44a (excluding both the standard time for filing objections and the additional time that the district court granted in response to defense counsel's request). In total, the court concluded that only 45 days had elapsed on the speedy trial clock, well within the 70-day limit. See *id.* at 46a. Accordingly, the court affirmed the denial of petitioner's STA claim.[2]

DISCUSSION

1. Petitioner first contends (Pet. 11-17) that this Court should grant the petition for a writ of certiorari

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[2] With respect to 12 additional days that petitioner challenged in the court of appeals but had failed to challenge in the district court, the court of appeals noted that "[t]he [STA] provides that '[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.' 18 U.S.C. § 3162(a)(2)." Pet. App. 46a. The court further observed that, "[e]ven if [petitioner] had raised these periods of delay, they would constitute only twelve additional days on the clock," resulting in a total of 57 nonexcludable days, "fewer than the 70 allowed by the [STA]." *Ibid.*

to decide whether time granted to a defendant to prepare pretrial motions may be excluded from the STA's 70-day time limit as a "period of delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1). This Court recently granted review to resolve that question in *Bloate* v. *United States*, cert. granted, No. 08-728 (Apr. 20, 2009). With respect to that question, the petition should therefore be held pending the Court's decision in *Bloate*.

2. Petitioner also contends (Pet. 17-26) that the Court should grant the petition for a writ of certiorari to decide whether the time for filing objections to a magistrate judge's report and recommendation on pretrial motions is excluded from the speedy trial clock under Section 3161(h)(1). The Court should hold the petition pending the decision in *Bloate* with respect to that question as well.

The Court's ruling in *Bloate* may render that issue irrelevant to the resolution of petitioner's STA claim. If this Court rules in *Bloate* that time granted for the preparation of pretrial motions is not excludable under Section 3161(h)(1), then petitioner will be able to establish an STA violation regardless of whether the court below correctly excluded time for filing objections to a magistrate's report and recommendation. Including the 154 days that the court below excluded as motion preparation time would bring the total number of days between petitioner's arraignment and the start of his trial to far more than the 70 days permitted under the STA, without taking into account the 44 days that the court below excluded as time for filing objections. Conversely, if this Court rules in *Bloate* that time granted for the preparation of pretrial motions is excludable under Section 3161(h)(1) (and the Court does not adopt the "ca-

veat" imposed by the court below that the trial court must "expressly stop the speedy trial clock," Pet. App. 27a), then petitioner will not be able to establish an STA violation even if the court below erred in excluding time for filing objections to a magistrate's report and recommendation. If all the time granted to prepare motions is excluded, only 65 days of nonexcludable time elapsed between petitioner's arraignment and the start of his trial, even if one includes the 44 days that the court below excluded as time for filing objections to the magistrate's report and recommendation—the 45 days calculated by the court below, minus the 24 days of preparation time included by the court below because of its caveat, plus the 44 days attributable to the objections period.

In addition, this Court's decision in *Bloate* is likely to provide guidance on the scope of both the general exclusion in Section 3161(h)(1) and the specific exclusion in Subsection (h)(1)(F). The Court's guidance on the scope of those provisions may well shed light on the correct resolution of the question whether the time for filing objections to a magistrate's report and recommendation on pretrial motions is properly excluded under the provisions. Accordingly, if this Court decides *Bloate* in a way that does not render that question irrelevant to the resolution of petitioner's STA claim, then the Court may wish to vacate the decision below with respect to that question and remand the case for further consideration in light of *Bloate*.[3]

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[3] Plenary review by this Court of the second question presented is not warranted. The ruling of the court below that the time for filing objections to a magistrate judge's report and recommendation is excluded under Section 3161(h)(1) is supported by this Court's decision in *Henderson* v. *United States*, 476 U.S. 321, 330 (1986), and consistent with

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Bloate* v. *United States*, cert. granted, No. 08-728 (Apr. 20, 2009), and then disposed of accordingly.

Respectfully submitted.

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JULY 2009

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the decision of every court of appeals that has resolved the question since *Henderson* was decided. See *United States* v. *Harris*, 566 F.3d 422, 430 (5th Cir. 2009); *United States* v. *Andress*, 943 F.2d 622, 626 (6th Cir. 1991), cert. denied, 502 U.S. 1103 (1992); *United States* v. *Long*, 900 F.2d 1270, 1275 (8th Cir. 1990). Contrary to petitioner's contention (Pet. 18), the Tenth Circuit in *United States* v. *Mora*, 135 F.3d 1351 (1998), did not resolve this issue. See *id.* at 1357 (holding that a magistrate judge "is subject to the thirty-day 'under advisement' period set forth in subsection (J)" and that the district judge is entitled to an "additional [30-day] excludable period in order to properly review the magistrate's report and recommendation," without specifically considering the question whether the ten-day period for filing objections is excludable). The two court of appeals decisions that have resolved the issue differently from the four courts of appeals that have held the ten-day period for filing objections is excludable time both predate *Henderson*. See *United States* v. *Thomas*, 788 F.2d 1250, 1257 (7th Cir.), cert. denied, 479 U.S. 853 (1986); *United States* v. *Robinson*, 767 F.2d 765, 769 (11th Cir. 1985). Confronted with the same question today, those courts of appeals might well resolve the question consistently with *Henderson* and with the courts of appeals that have addressed the question more recently. Accordingly, this Court's resolution of the question is not warranted at this time.

REPLY BRIEF

Supreme Court, U.S.
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No. 08-1264

IN THE
Supreme Court of the United States

TEJBIR S. OBEROI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Respondent's brief confirms that certiorari review is warranted in this case. Respondent recognizes the existence of circuit splits and the need for this Court's direction on both questions. *See, e.g.*, Opp. 13 n.3 (conceding that multiple "court[s] of appeals decisions have resolved the issue[s] differently from ... [multiple other] courts of appeals"); *id.* 12 (admitting that "the Court's guidance ... may well *shed light on the correct resolution* of the question[s]" at issue in this case). Indeed, Respondent acknowledges that, at minimum, this petition should be held for consideration with *Bloate v. United States*, cert. granted, No. 08-728 (Apr. 20, 2009). But Respondent is incorrect in suggesting that merely holding this petition for *Bloate* is the proper course of action here. This petition raises two independent, outcome-determinative questions of statutory interpretation that have divided the courts of appeals. As detailed below, plenary review of both questions is warranted.

REASONS FOR GRANTING THE WRIT

I. The Government Agrees That, At A Minimum, This Court Should Hold This Petition To Consider The First Question Presented With *Bloate*.

As Respondent recognizes, this Court recently (but after the filing of this Petition) granted review in *Bloate v. United States*, cert. granted, No. 08-728 (Apr. 20, 2009), which raises the first question presented by Petitioner—whether time for preparing a pretrial motion is automatically excluded from the 70-day speedy trial clock under 18 U.S.C. § 3161(h)(1). Petitioner agrees with Respondent, *see*

Opp. 10-11, that, as to this first question, Petitioner's case should, at the very least, be held pending the Court's decision in *Bloate*. Alternatively, Petitioner respectfully suggests that the Court review this case in conjunction with its review of *Bloate*, as Petitioner's case may be a superior vehicle for deciding the question at issue there. After all, even Respondent acknowledges that, if this Court holds motion preparation time not to be excludable from the speedy trial clock, "then [P]etitioner will be able to establish an STA violation," Opp. 11, whereas Respondent has made no such concession in *Bloate* and indeed has disputed whether such a holding would result in a violation based on the facts of that case, *see* Br. in Opp. 11-12, *Bloate v. United States*, No. 08-728 (Feb. 4, 2009).

II. The Court's Decision In *Bloate* Will Not Render Moot Petitioner's Second Question Presented.

Respondent suggests that, under any likely outcome of this Court's resolution of *Bloate*, the second question presented in this case—whether time for filing objections to a magistrate judge's report and recommendation is automatically excluded from the speedy trial clock under § 3161(h)(1)(D)—will become moot and that this Court's consideration of that question will therefore be unnecessary. Opp. 11-12.[1] But just the opposite

[1] As in the Petition, citations are to the current sub-paragraph designations in § 3161(h). *See* Pet. 5 n.2. Any quotations pre-dating the re-designation have been altered with bracketed text to refer to the current version of § 3161(h).

is true: Under only one likely scenario could the *Bloate* decision render Petitioner's second question unnecessary to decide. In particular, a *favorable* decision in *Bloate*—that is, one holding that motion preparation time is not excludable—would necessarily result in a finding that Petitioner's speedy trial clock expired, thus making it unnecessary to resolve the remaining Speedy Trial Act issues.[2] But Respondent is mistaken in suggesting that an *unfavorable* decision in *Bloate*—that is, one deciding that motion preparation time should be excluded from the speedy trial clock—would likewise render unnecessary a resolution of Petitioner's second question presented.

To begin, Respondent assumes that such a holding would include a rejection of the Second Circuit's caveat that motion preparation time can be excluded only if the court stops the speedy trial clock on the record or in a written order. As Respondent points out, the district court's failure to satisfy that caveat accounts for 24 of the 45 non-excluded days that the Second Circuit determined had accrued on Petitioner's speedy trial clock. Opp. 10. Accordingly,

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[2] And even under that scenario, this Court's review of the second question would still be appropriate if the case were under review in conjunction with *Bloate*. Where a case presents two questions that are equally appropriate for court review and equally outcome-determinative, the Court's determination on one question does not preclude the Court from deciding the other. *Cf., e.g., Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) ("Even if it may be good practice to decide no more than is necessary to determine an appeal, ... [t]he case d[oes] not become moot when th[e] court [decides one potentially dispositive question].").

Respondent argues that subtracting those 24 days would leave Petitioner with only 21 days accrued, meaning an addition of the 44 days at stake in the second question presented (the time set aside for objecting to the magistrate's report) would still fall short of the 70-day limit. *Id.* 11-12. But there is no basis for this assumption; the Court could very well adopt the same caveat. In that case, the inclusion of the 44 days at issue would, if added to the 45 days that had otherwise accrued, result in an 89-day count and clearly exceed the statutory time limit.

Further, resolution of the second question could establish a violation of the Speedy Trial Act even without counting those 24 days. This is so because 13 additional days for which Respondent has not properly accounted should be added to the total time accrued, which would then leave 78 days on Petitioner's speedy trial clock rather than the 65 that Respondent suggests.[3] The Second Circuit appeared to reserve judgment on these 13 days (representing the periods of December 12-18, 2003 and January 6-11, 2004), simply stating that whether the days were excluded or included would not change the outcome under the court's analysis, as only 45 days had otherwise accrued. *See United States v. Oberoi*, 547 F.3d 436 (2d. Cir. 2008), reprinted at App. 46a ("[T]hese periods of delay ... would constitute only

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[3] This encompasses the 45 days the Second Circuit determined had accrued, minus the 24 days representing the caveat time, plus the 13 additional days not accounted for by Respondents, plus the 44 days for time for objecting to the magistrate's report (i.e., the days at stake in the second question presented).

twelve additional days on the clock.[4] Combined with the periods listed above [encompassing 45 days], only 57 days could be counted on his speedy trial clock – fewer than the 70 allowed by the Act."). The court additionally noted, however, the possibility that the time periods in question might necessarily be excluded if Petitioner had failed to properly raised those periods in the district court, citing the Speedy Trial Act's provision that "failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." *Id.* (quoting 18 U.S.C. § 3162(a)(2)).

But if the inclusion or exclusion of these 13 days were outcome determinative—as it would be if the 44 days of time for objecting to the magistrate's report were included—then there can be little dispute that the 13 days should be counted against Petitioner's speedy trial clock. Respondent acknowledged as much in its briefs to the Second Circuit. *See* Appellee's Br. at 45-46, *United States v. Oberoi*, 547 F.3d 436 (2d. Cir. 2008) (No. 04-4545-cr(L)) ("The government would agree that on the current record, the remaining 12 days should count against the 70-day speedy trial clock.").[5] With that addition, the 44

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[4] The Second Circuit counted only 12 days, rather than 13, for the time period identified, but that may have been simply the result of computational error. *See Oberoi*, App. 46a. In any event, the one-day discrepancy does not make a difference to the outcome.

[5] Like the Second Circuit, Respondent counted only 12 days, but this may have been the result of a computational error. *See infra* note 4.

days at issue in the second question presented regarding time for objecting to a magistrate's report remain dispositive even accepting all of Respondent's other computational assumptions, such as subtracting the caveat-related time counted by the Second Circuit. Petitioner's second question presented, therefore, remains crucially relevant and dispositive in the event that the Court issues an unfavorable decision in *Bloate*.

Moreover, contrary to Respondent's suggestion, the Court's opinion in *Bloate* is highly unlikely to "shed light on the correct resolution of the magistrate's issue" such that the Court's separate treatment of that issue becomes unnecessary. Opp. 12. *Bloate* simply does not present the question whether time for filing objections to a magistrate's report and recommendation is excludable, and so the Court will be constrained by its own rules and practices from reaching out to decide that issue. *See* S. Ct. R. 14.1(a) ("Only the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court."); S. Ct. R. 24.1(a) (A brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the petition.); *see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) ("A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'"). As a result, any guidance given by the Court in *Bloate* will be, at best, only indirectly applicable to the second question presented in this petition, and as such, will be open to varying interpretations and applications, thus making possible further fissures among the circuit courts.

Avoiding such confusion and resolving once and for all the circuit splits on the exclusions allowed under § 3161(h)(1)(D) are all the more reasons to grant review of this case in conjunction with the Court's review in *Bloate*.

III. The Court's Decision In *Henderson* Does Not Resolve Petitioner's Second Question Presented.

In further opposition to granting review of the second question presented, Respondent asserts that a 23-year old decision, *Henderson v. United States*, 476 U.S. 321 (1986), provides all the guidance that any lower court might need on the issue. Opp. 12-13 n.3. But the existence of a live circuit split, which includes recent decisions expressly rejecting the applicability of *Henderson*, proves otherwise. *See, e.g.*, *Oberoi*, App. 31a (describing the government's citation of *Henderson* in its brief before the Second Circuit as "dubious").

Henderson, of course, does not resolve—or even address—the question of whether time for filing objections to a magistrate's report and recommendation is excludable from the speedy trial clock. Instead, *Henderson* addressed two distinct and "narrow questions" regarding periods of exclusion under § 3161(h)(1)(D): (1) "whether exclusion [under that subsection] is limited to reasonably necessary delays"; and (2) "whether [that subsection] applies to delays occasioned by the filing of posthearing briefs on motions." 476 U.S. at 322. In doing so, the Court held that § 3161(h)(1)(D) "excludes time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the

motion." *Id.* at 331. But that holding offers no instruction whatsoever on the key question dividing the circuits on the present issue—namely, whether a magistrate's filing of a report and recommendation is considered to be an actual disposition of a motion, a re-filing of a motion, or just one further piece of information that the court is awaiting before its own decision on the motion. *See* Pet. 18-19. If the magistrate's report and recommendation is considered to be a disposition of the motion, as the Seventh and Eleventh Circuits hold, then *Henderson*'s holding is completely consistent with a determination that the time for objecting to a magistrate's report is not excludable; after all, if the magistrate already disposed of the motion, then the time given for objecting to the report is essentially time spent waiting for a *new* motion and not time spent waiting for materials necessary to deciding a *presently pending* motion.

That *Henderson* does not directly answer the question of whether a magistrate's report and recommendation is considered to be a disposition of the motion is recognized even by the one circuit that found *Henderson* at least somewhat instructive on the general issue. *See United States v. Andress*, 943 F.2d 622, 626 (6th Cir. 1991) ("In *Henderson*, the district had made no reference of issues to the magistrate, and the Supreme Court, therefore, did not consider what effect such a procedure would have had on the case."). Apart from *Andress*, none of the circuits that have addressed the exclusion or inclusion of time for filing objections to a magistrate's report have looked to *Henderson* for guidance. To the contrary, two circuits expressly rejected the applicability of *Henderson*. *See Oberoi*,

App. 31a (describing the government's citation to *Henderson* as "dubious"); *United States v. Mora*, 135 F.3d 1351, 1357 (10th Cir. 1998) (also rejecting the government's argument that *Henderson* is controlling). Thus, even if, as Respondent suggests, *Henderson* truly can resolve the question presented here, the Court apparently needs to clarify that point for the courts of appeals, which have uniformly failed to see *Henderson* as controlling.

Furthermore, since *Henderson* is not controlling and in fact did not control the post-*Henderson* decisions in the Second, Sixth, Eighth, and Tenth Circuits, there is no reason to assume, as Respondent contends this Court should, that the pre-*Henderson* decisions of the Seventh and Eleventh Circuits would be decided any differently today.[6] That there is a present need for clarification and guidance from this Court is acknowledged even by Respondents: In the course of arguing that Petitioner's case should be held pending the decision in *Bloate*, Respondent states that "the Court's guidance on the scope of [the related speedy trial

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[6] In pointing out that the Seventh and Eleventh Circuit decisions pre-date *Henderson*, Respondent fails to note that, although the Seventh Circuit's decision in *United States v. Thomas*, 788 F.2d 1250 (7th Cir. 1986), was initially decided on April 17, 1986—approximately two weeks after this Court heard argument in *Henderson*, though a full month before the Court issued its decision on May 19, 1986—the Seventh Circuit amended and reissued its opinion in *Thomas* after denial of rehearing and rehearing en banc on June 6, 1986. Had the Seventh Circuit considered *Henderson* to be controlling, that court had ample opportunity to reconsider its analysis before denying rehearing and publishing its amended decision.

provision at issue there] may well *shed light on the correct resolution* of the question whether time for filing objections to a magistrate's report and recommendation on pretrial motions is properly excluded." Opp. 12 (emphasis added). If *Henderson* has already provided sufficient guidance and if the courts of appeals are not actually divided, then why would the Court need to "shed light on the correct resolution of the question" in the course of deciding the matters at issue in *Bloate*?

Petitioner shares Respondent's hope that this Court will indeed shed light on the correct answer to the question of whether time for objecting to a magistrate's report is excludable under the Speedy Trial Act. Petitioner respectfully suggests that the best way to do so is by granting plenary review in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

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